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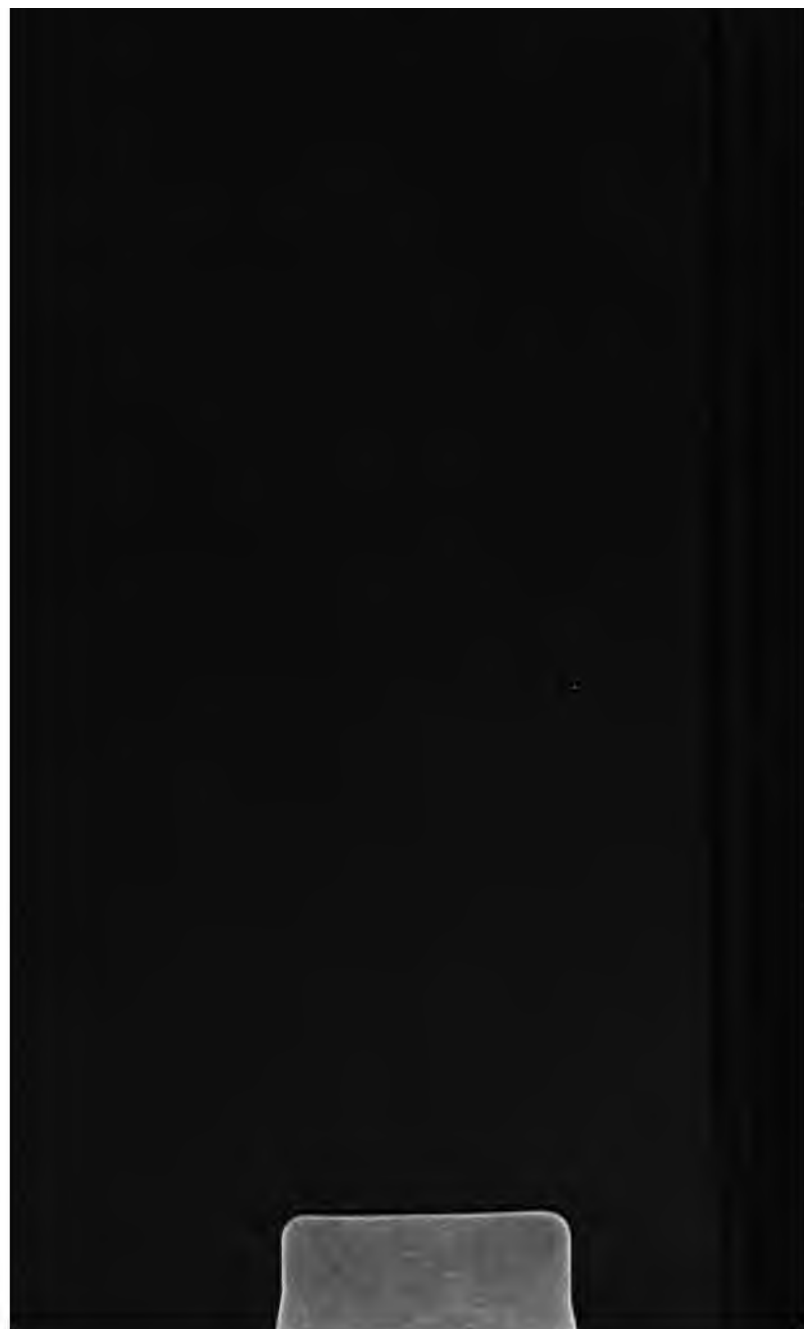
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JUDICATURE ACTS

THE NEW PRACTICE
CASES.



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REPORTS OF THE CASES
DETERMINED IN THE
SUPREME COURT OF JUDICATURE
ILLUSTRATIVE OF
THE NEW SYSTEM
OF
PRACTICE AND PLEADING.

EDITED BY

W. T. CHARLEY, D.C.L., M.P.,

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW, LATE EXHIBITIONER OF THE COUNCIL
OF LEGAL EDUCATION, AUTHOR OF TREATISES ON "THE NEW SYSTEM OF PRACTICE
AND PLEADING UNDER THE SUPREME COURT OF JUDICATURE ACTS, 1873,
1876, AND 1877," AND ON "THE REAL PROPERTY ACTS, 1874,
1875, AND 1876."

VOLUME II.



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1877.

NOTICE.—The Index to the “Court Cases” contained in this Volume will be appended to Vol. III., as that Volume will complete the second series of “Court” Cases, illustrative of the Supreme Court of Judicature Acts, commenced in the present volume.

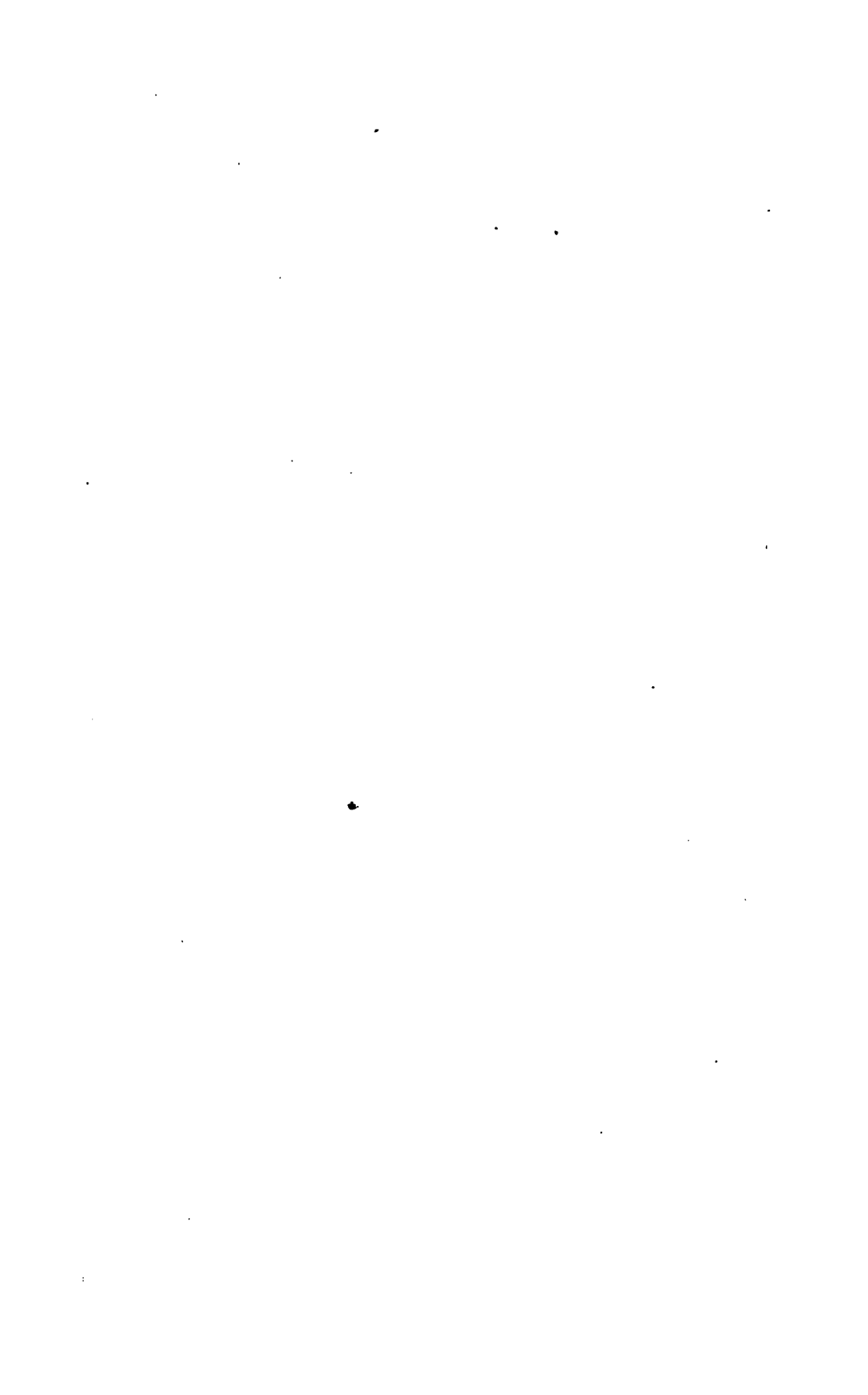
P R E F A C E.

THE present Volume completes the Reports of all the "Chamber Cases" which Her Majesty's Judges have allowed to be made public. As the ground on which the Judges have decided that no more Chamber Cases shall be made public, is that the Chamber Cases already published form an ample series of precedents of Chamber Practice, the importance of acquiring a knowledge of these precedents must be obvious. It is hoped that the full marginal notes and references, and the copious Indices, which accompany the Cases, will prove a means of facilitating the acquisition of this knowledge.

The remainder of the Volume comprises "Court Cases" decided during the Hilary, Easter and Trinity Sittings of the Supreme Court of Judicature in the present year, in continuation of the "Court Cases" contained in the first Volume. That a work like the present, in which all the new Practice Cases are arranged under their appropriate Sections and Rules, was needed by the Profession, appears to be proved by the steady demand for the numbers of the first Volume.

W. T. C.

5, Crown Office Row, Temple,
October 27th, 1876.



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2. The Preface, prefixed to No. 1.
3. The List of Reported Cases, prefixed to No. 4.
4. The Table of Contents, prefixed to No. 4.
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REPORTS OF CASES.

SUPREME COURT OF JUDICATURE ACT, 1873.

SECTION 3.

(Union of existing Courts into one Supreme Court.)

SUPREME COURT OF JUDICATURE.

HIGH COURT OF JUSTICE.—CHANCERY
DIVISION.

(Before Sir R. MALINS, V.C.)

January 22nd, 1876.

HOPEWELL v. BARNES.

A judgment by default had been obtained in an action under the Bills of Exchange Act in the Common Pleas Division against a person interested in a fund in this Court standing to the credit of this cause, which was instituted before the Supreme Court of Judicature Acts came into operation. The plaintiff in the action having obtained a stop order at chambers, the Registrar had requested that the matter might be mentioned in Court, inasmuch as, under the old practice, it would have been necessary, before applying for the stop order,

The Judges of the Court of Chancery being now Judges of the High Court, of which the Common Pleas is now a Division, it follows that where a judgment has been recovered against a person interested in a fund in the Chancery

2 SUPREME COURT OF JUDICATURE ACT, 1873.

Division, a stop order will be granted to the judgment creditor by a V.C., without a preliminary charging order having been obtained in the Common Pleas Division, in which the judgment was recovered.

to have obtained a charging order in the Court in which the judgment was obtained.

Crossley applied that the stop order might be passed by the Registrar.—He argued that the ground of the old rule was that the Judges of the Court of Chancery were not Judges of the Superior Courts at Westminster within the meaning of section 14 of the 1 & 2 Vict. c. 110; *Miles v. Presland*, 4 My. & Cr., 431; *Hulkes v. Day*, 10 Sim., 41. Order XLVI, Rule 1, provides that a charging order may now be made by any Judge, so that a charging order and stop order could now be made by one consolidated order in this Division.

MALINS, V.C., thought it was quite clear that the Supreme Court of Judicature Acts made it no longer necessary to obtain a preliminary order in the Common Pleas Division, and directed the stop order to be passed.*

SECTION 16.

SUB-SECTION (1).

(Jurisdiction of the Master of the Rolls transferred to the High Court of Justice.)

January 19th, 1876.

In Re MORGAN'S PATENT.

The jurisdiction over the Register of

This was a motion by John Eglin to have an entry in the Register of Patent Proprietors

* L. R., 1 Ch. Div., 630; W. N., 1876, p. 28; 11 N. C., 18; 24 W. R., 629. See, further, as to this section under section 31, *infra*.

expunged under section 38 of the 15 & 16 Vict. c. 83. *Patent Proprietors, which was conferred on the Master of the Rolls by the 15 & 16 Vict., c. 83, s. 38, can be no longer exercised by him, having been transferred to the High Court of Justice by section 16, sub-section (1), of the Supreme Court of Judicature Act, 1873.*

The entry was that of an indenture of assignment of certain letters patent, which was expressed to be made between William Morgan, as assignor, of the one part, and William Smith and Josiah Edwards, as assignees of the other part.

John Eglin alleged that it was a fraud upon a previous assignment of the letters patent by William Morgan to himself.

An action had been commenced in the Chancery Division of the High Court of Justice by Smith and Edwards, with the object of setting aside the assignment to Eglin.

On the hearing of the motion a difficulty arose as to the proper mode of entitling the notice, the question being whether, under section 16, sub-section (1) of the Supreme Court of Judicature Act, 1873, the jurisdiction to expunge entries in the Register of Patent Proprietors, which was conferred on the Master of the Rolls by the 15 & 16 Vict. c. 83, s. 38, was transferred to the High Court of Justice, or whether such jurisdiction remained in the Master of Rolls as a jurisdiction "in relation to records in London or elsewhere," under section 17, sub-sect. (6) of the same Act. Under these circumstances a notice of motion had been served without being marked with the name of any Court or Judge.

Chitty, Q.C., and *Lawson*, for the motion, suggested that the notice should be marked with the name of the Master of the Rolls as

Keeper of the Records. They referred to *In Re Horsley and Knighton's Patent*, L. R. 4 Ch., 784, 39 L. J. Rep. (N. S.) Ch., 157, 18 W. R., 1000, which decided that the effect of section 38 of 15 & 16 Vict. c. 83, was to vest the jurisdiction over the Register in the Master of the Rolls as Keeper of the Records, and not as a Judge in Chancery, and that consequently, there was no appeal from his order to expunge an entry.

Locock Webb, Q.C., for the persons served with the motion.

JESSEL, M.R.—The meaning of sub-section (6) of section 17 of the Supreme Court of Judicature Act, 1873, is that the jurisdiction to be retained by the Master of Rolls is in relation to records of which the custody was given to him by the Public Record Act (1 & 2 Vict. c. 94). The Register of Patent Proprietors is not such a record. Although, before the Act of 1873, the Master of Rolls had sole jurisdiction in Chancery over the Register, he has no such jurisdiction now. It has passed from him to the High Court of Justice by section 16, sub-section (1) of the Act of 1873. I give leave to amend the notice of motion by entitling it, "In the High Court of Justice," and, on each party's undertaking not to execute any deed or document affecting the patent, which can be put on the Register of Proprietors, I will direct the motion to come on when the action is tried.*

* W. N., 1876, p. 27; 24 W. R., 245; 11 N. C., 17.

SECTION 17.

See *IN RE MORGAN'S PATENT*, reported under section 16, subsection (1) of the Supreme Court of Judicature Act, 1873.

SECTION 18.

(*Jurisdiction transferred to the Court of Appeal.*)

DIVISIONAL COURT OF APPEAL FROM
INFERIOR COURTS.

(Before BRAMWELL, B., MELLOR and DENMAN, JJ.)

April 28th, 1876.

*I.E. BLANCH v. REUTER'S TELEGRAM COMPANY,
LIMITED.*

This was an appeal from a judgment delivered on the 19th Feb., 1876, by Sir Thomas Chambers, Common Serjeant, sitting as Judge of the Lord Mayor's Court, upon a demurrer to a replication in an action in that Court.

The declaration claimed damages for delay in delivering a telegram at Hong Kong. The third plea was that the defendants received the message upon condition that neither they nor their agents should be held responsible in any case for delay in the transmission of, or for the non-delivery of, any telegram. The second replication, to which the defendants demurred, alleged gross negligence on the defendants' part.

The Common Serjeant's judgment was as follows:—This is an action brought to recover damages for delay in the delivery of a telegraphic message transmitted from London to Hong Kong, to which the defendants pleaded

The Divisional Court of Appeal from Inferior Courts has no jurisdiction to hear an appeal from a judgment of the Lord Mayor's Court upon a demurrer to pleadings, but the Court of Appeal has, under sec. 18, sub-sec. (4), of the Supreme Court of Judicature Act, 1873, such jurisdiction.

that by the contract they are protected from liability by reason of the condition to that effect stated on the forms in use by the defendants. That condition is as follows: "Conditions:— Neither the company nor their agents will be responsible in any case for delays or mistakes in the transmission of, nor for the non-delivery of any telegram, from whatever cause arising." To this defence it is objected, first, that while the words expressly repudiate liability for non-delivery, they do not in terms repudiate such liability for delay in delivery of a message. To this objection there are two answers (not to mention the protection against default "from whatever cause arising"), first, that if they are not liable for non-delivery, *a fortiori* they would not be liable for delay in delivery; and secondly, that as delivery is a part of transmission (which is not complete until delivery), and as the condition makes the defendants irresponsible for non-transmission of a message, they are clearly protected under the terms of the contract for the delay in delivery alleged in the declaration. But it is further objected that, assuming that the words of the conditions are large enough to cover the default alleged, still the condition is void for unreasonableness; and cases were cited on both sides in the argument before me. The cases quoted for the plaintiff turned on the liability of railway companies as common carriers, or on the terms of Canal Acts imposing special responsibilities as carriers by water, or on the terms of Telegraph Acts, and do not seem to

me to bear materially upon the question. It was also contended for the plaintiff that the case is one of bailment, and that the defendants are bailees for hire, and cannot protect themselves from liability for their own negligence. But to this reasoning I am unable to assent. The contract was to render a service; and, as the party undertaking to render it was under no public or statutory obligation in relation to it, he was at full liberty to impose such restrictions upon his liability as he thought right, and having imposed the restriction contained in the condition mentioned, and the plaintiff having assented to them by entering into the contract, the latter is bound by the condition, and judgment must be for the defendants.

The Common Serjeant reserved leave to the plaintiff to appeal from his judgment; and the plaintiff accordingly delivered to the defendants a notice, headed with the name of this Court, that Counsel on his behalf would move this Court to set aside the judgment on demurrer, and enter judgment for the plaintiff on grounds stated in the notice.

Before the appeal came on to be argued,

Watkin Williams, Q.C. (H. D. Greene with him), on behalf of the defendants, took a preliminary objection to the jurisdiction of this Court to entertain this appeal. This is what, before the Supreme Court of Judicature Acts, was called "error" upon demurrer; and although such a proceeding is now to be called an appeal, the existing special remedy is not altered. No doubt the Lord Mayor's Court is

an "Inferior Court" within the meaning of sect. 45 of the Supreme Court of Judicature Act, 1873, and appeals on some matters in that Court are by that section directed to be brought here, but the extent of those appeals is limited, and there is nothing to set aside or alter any previous enactment on the subject. This is an appeal, if we adopt the common and not the technical use of the word, which might before the passing of that Act have been brought to the Exchequer Chamber. By the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), sect. 4, "In all cases of error arising on proceedings in the Mayor's Court, the Exchequer Chamber shall be the Court of Error for the purposes of this Act." The Exchequer Chamber, in June last, entertained and decided a case of error from the judgment of the Lord Mayor's Court upon a demurrer to a plea: (*Simpson v. Henning*, L. Rep., 10 Q. B., 406). Now by sect. 18, sub-sect. (4), of the Supreme Court of Judicature Act, 1873, there is transferred to and vested in the Court of Appeal, all jurisdiction and powers of the Court of Exchequer Chamber. There is nothing in the 45th section constituting this Court for appeals from Inferior Courts, which overrules these express provisions concerning appeals upon demurrers in the Mayor's Court.

Pollard (*Russell*, Q.C., with him), for the plaintiff, the appellant.—No doubt before the Supreme Court of Judicature Acts the Exchequer Chamber was the Court for errors from

the Mayor's Court; but by Order LVIII., Rule 1, proceedings in error are abolished. There is no reservation or qualification, and by Rule 2, "all appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding, other than such notice of motion, shall be necessary." Errors, therefore, it seems, are placed on the same footing as other appeals, and all appeals from the Mayor's Court are directed to be brought here. Moreover, the leave reserved by the Common Serjeant justifies the plaintiff's application.

BRAMWELL, B.—We are all of opinion that we have no jurisdiction to hear this appeal.

MELLOR, J.—It is plain, from the enactments cited, that the jurisdiction of the Court of Exchequer Chamber has been transferred to the Court of Appeal. The Court of Appeal, therefore, is the proper tribunal to decide the questions raised in this case.

DENMAN, J., concurred.

The COURT, with plaintiff's consent, directed that the costs of this motion of appeal should be the defendants' costs in the cause.*

COURT OF APPEAL.

(Before JAMES, MELLISH and BAGGALLAY, L.JJ.)

May 4th, 1876.

GLOVER v. GREENBANK ALKALI COMPANY. *The Lords*

Fischer, Q.C., asked for leave to file an affidavit, notwithstanding an irregularity in the *Justices of Appeal, not*

* L. R. 1 App. Cas., 408; 34 L. T., 691; Times, Monday, May 1st, 1876.

10 SUPREME COURT OF JUDICATURE ACT, 1873.

being members of the High Court of Justice, have no power to give leave to file an affidavit in the Chancery Division of that Court.

jurat. The application was made to their Lordships because the Master of the Rolls, before whom the matter would be brought on the following day, was sitting at Westminster as a Judge of the Court of Appeal.

JAMES, L.J.—We have no jurisdiction to make the order. We had it formerly, but now we are not part of the High Court of Justice. You may make your application to the Master of the Rolls at Westminster, but probably one of the Vice-Chancellors would make the order.

The application was then made to Vice-Chancellor Hall, who made an order, for the Master of the Rolls, that the affidavit should be filed.*

COURT OF APPEAL.

(Before JAMES, MELLISH and BAGGALLAY, L.JJ.)

July 5th, 1876.

ALLAN v. THE UNITED KINGDOM ELECTRIC TELEGRAPH COMPANY, LIMITED.

The Court of Appeal has no jurisdiction to order the enrolment of a decree of the Court of Chancery, enrolled previous to the 1st November, 1875, to be vacated. The power to make such an order is now vested

This suit, originally instituted by Thomas Allan, had, on his death, been revived by his executors, who now moved in person that the decree in the suit made by MALINS, V.C., on the 28th of June, 1871, and enrolled on the 12th of July following, might, notwithstanding the enrolment thereof, be re-heard by the Court of Appeal, and be reversed or varied. The notice of motion set out several grounds for the application, namely, that the defendants had been

* W. N., 1876, p. 157.

guilty of perjury, fraud, surprise, and concealment of evidence, and that the plaintiffs had recently discovered important facts which could not have been discovered at an earlier date. *in the Lord Chancellor only.*

T. A. Roberts (Cotton, Q.C., with him) appeared for the defendants.

The COURT refused to hear the application. The Court of Appeal had no jurisdiction to order the enrolment to be vacated. There could be no appeal from an enrolled decree except to the House of Lords, and the Lord Chancellor was now the only person who could order the enrolment to be vacated.*

COURT OF APPEAL.

(Before JAMES, MELLISH, and BAGGALLAY, L.JJ.)

July 19th, 1876.

CAVE v. MACKENZIE.

This was an action in the Chancery Division of the High Court, and was set down to be tried before the Master of the Rolls, who made an order that the issue of fact in the case should be tried before a jury at the assizes at Chelmsford. The action was set down accordingly, and came on for trial at Chelmsford, before Mr. Baron HUDDLESTON. He, after consulting the Lord Chief Justice, refused to try the case, on the ground that it belonged to the Chancery Division, and said that the case must go back to the Master of the Rolls. The case was accordingly struck out of the list. The result *An order of a Judge at assizes, that an action entered for trial before him should be struck out of the list, is not appealable to the Court of Appeal, although the action has been sent down for trial at the assizes by the M.R., pursuant to Order XXXVI., Rule 39.*

of this was that the expenses already incurred in relation to the trial—amounting, it is understood, to £150—were entirely thrown away. Under these circumstances, application was made to the Master of the Rolls to-day for his directions. He was of opinion that his order was a perfectly regular one, but did not see his way to help the parties out of the difficulty. Thereupon

Romer, on behalf of the plaintiff, applied to the Court of Appeal for leave to serve a notice of appeal from the order of Mr. Baron HUDDLESTON, with the view of getting the case tried before the conclusion of the assizes.

THE COURT thought that this was not an order which could be appealed from, and did not see how they could interfere. They suggested, however, that, perhaps, the plaintiff might petition Parliament, or make some application to the Lord Chancellor or the Attorney-General.*

COURT OF APPEAL.

(Before JAMES, MELLISH and BAGGALLAY, L.JJ.)

July 31st, 1876.

GARLING v. ROYDS.

The jurisdiction of the Court of Appeal is purely appellate. An application to the Court of Ap-

Whitehorne applied to their Lordships, on behalf of the plaintiff in this action, under the following circumstances:—The suit was commenced by the plaintiff, under the old procedure, by bill in Equity, for the purpose of

* 11 N. C., 161; W. N., 1876, p. 237; *Times*, July 19th, 1876.

being relieved on equitable grounds from his legal liability to the defendant on a promissory note, which it was sought to cancel as having been obtained by fraud and misrepresentation. Since the 1st of November, 1875, directions were given by Vice-Chancellor HALL, for whose Court the bill was marked, that the suit should proceed under the new practice; and leave was given to the defendant to file a counterclaim, which was in effect an action against the plaintiff in Equity upon the promissory note. The plaintiff desired to have the action tried by a jury, and had on the 27th of July, 1876, given notice for trial by jury as provided by the First Schedule to the Supreme Court of Judicature Act, 1875. But, on making the usual application to set down the action for trial in Middlesex for the 7th of August, 1876, the plaintiff was confronted by the difficulty that has arisen from the difference of opinion which prevails between the Judges of the Chancery and Common Law Divisions as to how and where actions originating in the Chancery Division are to be tried by jury; and from the apparent absence of any supreme authority competent or willing to settle this unfortunate difference of opinion. The Registrars of the Chancery Division, acting upon the opinions expressed by the Master of the Rolls and the Vice-Chancellors, refused without the direction of the Vice-Chancellor to set down this action for trial by jury. *peal to order the registrars of the Chancery Division, to set down an action in the Chancery Division for trial by jury, was therefore refused.* [The [Associates in the Common Law Divisions, in accordance with the view taken by the Lord Chief Justice and other Judges,

that the Chancery Judges are bound to try their own actions, had equally refused to set down this action for trial in Middlesex. Under these circumstances an application was this morning made to Vice-Chancellor HALL for his direction to the Registrars to set down the action for trial by jury. The Vice-Chancellor having declined, in the present state of business before the Court, to give any such direction, the application was now renewed to the Court of Appeal.

Lord Justice MELLISH observed that under the new procedure the jurisdiction of the Court of Appeal was purely appellate, and not, as that of the Lords Justices formerly, a superintending jurisdiction. The Court could not give directions to the Registrars with respect to setting down the causes, or entertain any application except on a formal appeal from a formal order.

Whitehorne pointed out the hardship to which his client would be exposed if their Lordships refused to give any directions in the matter. The plaintiff had given notice for trial, and was bound to set down the case within six days (of which four had already expired,) and if he did not do so the defendant was entitled, as upon the plaintiff's default, to take the conduct of the proceedings out of the plaintiff's hands and to set down the action for trial in any way he liked.

The COURT declined to interfere, the plaintiff being dismissed with such consolation as might be derived from the legal maxim quoted

by one of their Lordships, "*Actus Curie nemini facit injuriam.*"*

COURT OF APPEAL.

(Before JAMES, MELLISH and BAGGALLAY, L.JJ.)

August 8th, 1876.

SMITH v. LEWIS.

In this case one Marshall had, on the 17th February, 1876, been sent to Holloway Prison for his contempt of Court in having flagrantly disobeyed an order of the Chancery Court of the County Palatine, made on the 25th of September, 1875. On the 13th of June, 1876, an order was made for his discharge on payment of the costs occasioned by his contempt, when taxed. The prisoner had afterwards applied to Vice-Chancellor BACON for his discharge upon payment of so much of the costs, which amounted to nearly £400, as he could meet, and on giving his personal undertaking for payment of the balance. Vice-Chancellor BACON refused to discharge him from custody, and the prisoner at once applied to the Court of Appeal for his release. As the contempt related to the breach of an undertaking not to see or to communicate with a young lady who was a ward of Court, their Lordships heard the application for release in private; and subsequently, one of their Lordships expressed himself in terms of strong indignation at

The Court of Appeal cannot interfere with the exercise of the discretion of a Judge of the Chancery Division, in refusing to release a person whom he had sent to prison for contempt of Court.

* *Times*, Wednesday, August 2nd, 1876. See, further, as to this case under Order XXXVI., Rule 27.

any notice in the newspapers of the fact that an application which was heard in private had been refused. On Saturday last the prisoner came up from Holloway Prison in custody, and applied in person to Vice-Chancellor BACON for his release, urging that he had been already five months in prison, and that, though he had made every effort to discharge the costs of the proceedings against him, he had not been able to get assistance from his friends, and could not while in gaol earn any money to free himself. The Vice-Chancellor refused the application, observing that Marshall had been sent to prison, not simply for non-payment of costs, but for conduct of a most scandalous description. For that offence he was sent to prison, and to prison he must return. The young lady's guardian was not to be made to pay the costs of protecting his charge. From this refusal Marshall now appealed in person to the Court of Appeal.

In support of his application the prisoner read the affidavit which he had sworn in support of his application to the Vice-Chancellor, to the effect that he had no prospect, so long as he was in prison, of being able to pay the amount of the costs; that he had been always ready and willing to submit to such terms as the Court should impose in granting the order of release; and that he had no desire to avoid payment of the costs, though he had no means at present of earning money for their payment.

BAGGALLAY, L. J.—Our difficulty is that your application to the Vice-Chancellor on

Saturday last was that he should release you, not as a matter of right, but simply and solely on a merciful consideration of your case; and on that ground, as we understand it, the Vice-Chancellor, in the exercise of his discretion, refused your application. We are not in possession of the details which were laid before the Vice-Chancellor, who, having the whole matter under his consideration, thought it was not a case for showing you any mercy.

JAMES, L. J.—We cannot interfere with the order of the Vice-Chancellor.

The Prisoner.—How long am I to be kept in gaol?

JAMES, L. J.—We do not sit as a Court of Appeal from the exercise by the Vice-Chancellor of his discretion. You cannot be released from prison without giving a material guarantee for the costs incurred.

North, on behalf of the plaintiff, wished to add that the prisoner had threatened to publish the details of his case after he came out of prison, and suggested that their Lordships should acquaint him with the penalties of taking any such step.

JAMES, L. J.—He has been already warned by the Vice-Chancellor, and he leaves this Court warned.*

* *Times*, Wednesday, August 9th, 1876.

SECTION 19.

(*Appeals from the High Court of Justice.*)

May 17th, 18th and 29th, 1876.

THE "TRANSIT."

The Court of Appeal, following in this respect the principles laid down by the Privy Council, will not, except in a case of overwhelming pressure, reverse a decision of a Judge of the Admiralty Division, where he has come to a conclusion of fact upon conflicting testimony, and after hearing in open Court, and observing the demeanour of the witnesses; but where the Judge's decision is founded upon inferences drawn from the evidence by the Judge, it will, if erroneous, be reviewed, and, if necessary, reversed, without great pressure, by the Court of Appeal.

This was an appeal from a judgment of the Judge of the Admiralty Division in an action instituted by the owners of the steamship "Glannibanta" against the steamship "Transit" and her freight, to recover damages for a collision between the two ships.

The plaintiffs' statement of claim in the Court below was as follows:—

"1. Shortly before 1 p.m. on the 23rd January, 1876, the three-masted iron screw steamer 'Glannibanta,' of 534 tons register, and 99-horse power, of which the plaintiffs were owners, whilst proceeding from London to the Tyne, in ballast, had passed St. Nicholas' light-vessel for the purpose of entering and proceeding through Yarmouth Roads.

"2. The wind at this time was about southwest, a light breeze, the weather was fine, and the tide was in the last quarter ebb and of the force of about half a knot per hour, and the 'Glannibanta,' under steam and sail, was steering about north, and proceeding at the rate of about nine knots per hour.

"3. At such time those on board the 'Glannibanta' observed an approaching steamer under steam and sail (which proved to be the steamship 'Transit' proceeded against in this action) bearing about two points on the port bow of

the 'Glannibanta,' and at the distance of about one half to three quarters of a mile.

"4. The helm of the 'Glannibanta' was slightly ported, and she was kept on with a view to passing the 'Transit' port side to port side. The 'Transit,' instead of passing the 'Glannibanta' on her port side, as she should have done, starboarded her helm and caused danger of collision; and although the engines of the 'Glannibanta' were immediately stopped and reversed, and her helm was starboarded, the 'Transit,' with her starboard side abreast of the foremast, came into contact with the stem of the 'Glannibanta,' and a great deal of damage was thereby done to the 'Glannibanta.'

"5. The 'Transit' improperly neglected to take proper measures for passing the 'Glannibanta' on her port side.

"6. Those on board the 'Transit' improperly starboarded the helm of the 'Transit.'

"7. Those on board the 'Transit' did not duly observe and comply with the provisions of article 16 of the regulations for preventing collisions at sea.

"8. The said collision was occasioned by the negligent and improper navigation of the 'Transit.'

"9. The said collision was not occasioned by any negligence or default on the part of those on board the 'Glannibanta.'"

The defendants delivered a statement of defence and counter-claim, which was as follows:—

"1. The 'Transit,' a screw steamship of 345

tons register and ninety horse power with a crew of twenty-one hands, left Grimsby about 2 a.m. of the 23rd Jan., 1876, with a general cargo bound for Dieppe.

“ 2. Shortly before 1 a.m. of the same day the ‘Transit’ in the course of her voyage was passing through Yarmouth-roads, heading about S. by W. and keeping well over to the east side of the roads, as is the practice with vessels southward bound. The wind was about S.W. The weather was fine. The tide was ebb about three knots an hour. The ‘Transit,’ under sail, as well as steam, was making about eight knots an hour. A good look-out was kept on board of her.

“ 3. In these circumstances those on board the ‘Transit’ observed the steamship ‘Glannibanta’ about a mile off, right ahead and drawing on to their starboard bow under steam and sail, having signals flying and apparently heading towards the town of Great Yarmouth. The helm of the ‘Transit’ was starboarded about two points and then steadied, and the ‘Transit’ kept on, those on board of her expecting the ‘Glan-nibanta’ to pass starboard side to starboard side. The ‘Glannibanta,’ however, as she drew near, ported her helm and caused danger of collision, and, notwithstanding that the engines of the ‘Transit’ were stopped and reversed, the ‘Glan-nibanta’ came into collision with her, striking her with the stem very violently on her starboard bow in the fore-rigging.

“ 4. Save as hereinbefore appears, the several allegations contained in the statement of claim are untrue.

" 5. A good look-out was not kept on board the 'Glannibanta.'

" 6. The helm of the 'Glannibanta' was improperly ported.

" 7. Those on board the 'Glannibanta' improperly neglected or omitted to keep her on her course.

" 8. Those on board the 'Glannibanta' improperly neglected or omitted to ease, stop, and reverse her engines.

" 9. The collision was occasioned by some or all of the matters and things alleged in the 5th, 6th, 7th and 8th paragraphs hereof, or otherwise by the default of the 'Glannibanta' or those on board of her.

" 10. No blame in respect of the collision is attributable to the 'Transit' or to any of those on board of her."

The cause was heard in the Court below on the 21st March, 1876, before the Judge (Sir R. PHILLIMORE) and Trinity Masters.

Mihcard, Q.C., and *Clarkson*, for the plaintiff.

Benjamin, Q.C., *Phillimore*, and *Stubbs*, for the defendants.

Sir R. PHILLIMORE.—This is an important case of collision which happened about one o'clock in the middle of the day on the 23rd of January this year, in Yarmouth Roads, somewhere between the South Elbow Buoy and the South-west Scroby Buoy, off the Scroby Sands; the state of the weather was fine and clear and the tide was ebb. The vessels that came together in this collision were the three-masted iron screw steamship the "Glanni-

banta," of 534 tons register, and 99 horse power, the plaintiff in this action, going from London to the Tyne in ballast, and the "Transit," a screw steamer of 345 tons register, and 90 horse power, with a crew of 21 hands, the defendant in this action, bound from Grimsby to Dieppe with a general cargo. The parts of the vessels which came into contact were the stem of the "Glannibanta" and the starboard side of the "Transit," just abreast of the foremast. The case has been very well argued on both sides, and the importance of it well deserved such an argument. I have carefully considered the arguments and the evidence with the Elder Brethren of the Trinity House, and it is with their entire concurrence that I pronounce the following judgment: It appears that the "Glannibanta," preceded (a very material fact in this case) by a steamer called the "Paradox," came through Hewitt's Channel, and left the St. Nicholas light vessel on her port side and the Scroby South Elbow Buoy on her starboard side. It is expedient in all these cases, if possible, to see what the natural and proper conduct of a vessel would be, before we consider the conduct she actually pursued. Now in this case the natural and proper conduct for the "Glannibanta" was to make a fair course under a starboard helm to the N.N.W., and to port when clear of the Scroby buoys, and alter her course as she passed the lightship to N. or N. half E., and, having done that, to straighten down the roads, keeping the buoys

on her starboard hand. That is not denied to have been her natural course, but it has been contended, and with very great power, that her fault was this, that she went towards Yarmouth further than was necessary and proper, and thereby brought her starboard side open to the "Transit," which, on seeing her starboard side, was justified in starboarding, which it is admitted that she did. Amid a considerable conflict of evidence, we are of opinion that we may safely rely upon the testimony given by those on board the "Paradox"—by the two witnesses produced from that steamer—and according to their evidence the "Transit" passed the "Paradox" port side to port side. At that time the "Glannibanta" was about a quarter of a mile astern, it might have been a little more or a little less, and half a point on the port quarter of the "Paradox," and, as the witness described it, "on the edge of her wake" on a north course. It is clear that the "Transit" did not alter her helm until she had passed the "Paradox," and therefore, not until the "Glannibanta" had straightened down, and consequently the "Glannibanta" must have been at that time on the "Transit's" port bow. It is admitted that the "Transit" starboarded about two points, and the great debate before me has been as to when she effected that manœuvre. Now it appears to us that she must have done so when the "Glannibanta" was on her port side, and that therefore the "Transit" is alone to blame.

From this judgment the owners of the "Transit" appealed.

Benjamin, Q.C., Phillimore, and Stubbs, for the appellants.

Mihward Q.C., Butt, Q.C. and Clarkson, for the respondents.

Cur. adv. vult...

May 29. BAGGALLAY, L.J., now delivered the judgment of the Court :—

In the course of the argument on behalf of the plaintiffs we were much pressed with the language from time to time made use of by the Judicial Committee of the Privy Council in Admiralty cases, and particularly in the cases of *The "Julia"* (Lush., 224 ; 14 Moore, P. C. C., 210), and *The "Alice"* (3 Mar. Law Cas. O. S., 103), to the effect that, if in the Court of Admiralty there was conflicting evidence, and the Judge of that Court, having had the opportunity of seeing the witnesses and observing their demeanour, had come, on the balance of testimony, to a clear and decisive conclusion, the Judicial Committee would not be disposed to reverse the decision, except in cases of extreme and overwhelming pressure ; and it was urged upon us that in the present case there was no such extreme and overwhelming pressure as should induce us to reverse the decision of the Admiralty Division as to the question of fact upon which its decision was based. Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a Judge of First Instance, whenever, in a conflict of testimony, the demeanour and manner of the witnesses, who have been seen and heard by him,

are, as they were, in the cases referred to, material elements in the consideration of the truthfulness of their statements.

But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence, and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.

In the present case, it does not appear from the judgment, nor is there any reason to suppose, that the learned Judge at all proceeded upon the manner or demeanour of the witnesses; on the contrary, it would appear that his judgment, in fact, proceeded upon the inferences which he drew from the evidence before him, and which we have really the same means of considering that he had; and with this further advantage, that we have had his view of the inferences to be drawn from the evidence, as well as the evidence itself, made the subject of elaborate and able discussion on both sides.

We are unable to arrive at the same conclusion as that arrived at by the learned Judge of the Admiralty Division. It is quite true, as has been already stated, that the evidence of the captain and helmsman of the "Paradox" is to the effect that in their opinion the "Glanibanta" ported her helm immediately after she had passed the lightship, and that such evidence

is in accordance with that of the captain and helmsman of the "Glannibanta;" but it is in our opinion clear, from the circumstances to which we are about to advert, and to which the attention of the Judge of the Admiralty Division does not appear to have been directed, that these witnesses must have been mistaken. The captain of the "Glannibanta" himself most distinctly states that he saw the "Transit" directly after he ported, and that she was then about half a mile, or a little more, from the "Glannibanta;" and this is supported by other persons who were on board the "Glannibanta." Now, there is no dispute that the point at which the collision took place was upwards of a mile to the north of the lightship, though there is some slight difference of opinion as to the distance from Scroby Sands, and as the two vessels were approaching each other at about equal rates, the "Transit" must, at the time when the "Glannibanta" passed the lightship, have been at least a mile to the north of the point of collision, and at least two miles from the "Glannibanta;" and had the "Glannibanta" ported her helm immediately on passing the lightship, the "Transit," when first seen from the "Glannibanta," must have been at least two miles distant instead of half a mile or three quarters of a mile, which most of the witnesses, except those who were on board the "Paradox," agree in treating as about the distance between the two ships when the "Glannibanta" straightened her course. If, however, as is contended by the defendants, the

"Glannibanta" did not port her helm until she had left the lightship more than half a mile behind her, she would have been, when she ported, about half a mile to three quarters of a mile from the "Transit," each being about a quarter of a mile from the eventual point of collision.

Under these circumstances, having given our best consideration to all the evidence in the case, and having had the benefit of the advice of the nautical assessors by whom we have been assisted on the present occasion, we have arrived at the following conclusions, in which they entirely concur:—

1. That the "Glannibanta" continued on her course for more than half a mile after she had passed the lightship, whether or not she did so for the purpose of interchanging signals with Yarmouth, as suggested by the defendants, it is immaterial for us to consider. The fact is proved to demonstration by the evidence of the captain of the "Glannibanta," and it follows from this,

2. That by keeping on this course she led those on board the "Transit" to believe, and that they were justified in believing, that she was making for Yarmouth, and would pass them starboard to starboard.

3. That, having regard to these circumstances, the "Transit" was fully justified in starboarding when the "Glannibanta" was first seen from her deck, and that the "Glannibanta" was not justified in porting when in such close proximity to the "Transit."

4. That the collision was occasioned by such improper porting of the "Glannibanta," it being practically impossible to avoid a collision after the course of the "Glannibanta" had been changed.

In arriving at these conclusions, we are doubtless dissenting from the view expressed by the captain and helmsman of the "Paradox," upon which the Judge of the Admiralty Division relied, but we can well understand how in such a case persons desiring to speak with the most perfect honesty and accuracy, may have been mistaken. There was nothing in the surrounding circumstances prior to the collision to direct the attention of the people on board the "Paradox" to the movements of the "Transit" and the "Glannibanta," so as to induce them to watch such movements with any particular nicety, and the want of accuracy in such casual notices as were taken is exemplified by the circumstance that the captain of the "Paradox" states that the "Glannibanta," after she had straightened her course, was a quarter of a mile astern of him, whilst his helmsman makes the distance 200 yards only, and the captain of the "Glannibanta" says he was as much as half a mile, or nearly so, astern.

We cannot part with this case without expressing our surprise that there should have been no proper or sufficient look-out on board the "Glannibanta," for had there been a proper look-out, and the "Transit" had been seen from the "Glannibanta," as in such case

she must have been before the latter ported, we cannot for a moment suppose that that change of course would have been made.

The "Transit" was, in our opinion, very carefully and cautiously handled. The "Glannibanta" was carelessly and recklessly managed in changing her course in ignorance of the position of another vessel which was only half a mile off. It is possible, no doubt, that the careful ship may have blunderingly gone wrong, and that the careless ship may by accident have gone right, but the burthen of proof on the latter is then very heavy, and the "Glannibanta" has certainly not discharged it in this case.

Upon the whole, we are of opinion that the "Glannibanta" was alone to blame, and that, consequently the appeal must be allowed, the order of the Court below discharged, and the usual order of reference made for assessing the damage sustained by the "Transit." The costs both of the Court below and of the appeal must follow the result.

Judgment reversed.*

SECTION 22.

(Proceedings pending.)

COURT OF APPEAL.

(Before JAMES, MELLISH and BAGGALLAY, L. JJ., GROVE, J.,
and CLEASBY, B.)

February 15th, 1876.

TAYLOR v. GREENHALGH.

This was an appeal from a decision of the Court of Queen's Bench, reported L. R. 9 Q. B., *Two actions, one brought by A. and the*

* L. R., 1 P. & D., 283; 34 L. T., 934; 24 W. R., 1033.

other by B. against C., in respect of injuries sustained by A. and B. in an accident that occurred through C.'s negligence, resulted in verdicts for C. Final judgment was signed in July, 1874, and in September, 1874, B paid the costs in his action. A. and B. both gave due notice of appeal, but B. did not proceed with his appeal until after A's appeal had been heard in November, 1875. On January 18, 1876, B. gave notice of appeal, and his appeal came on for hearing under the Supreme Court of Judicature Act, 1875. Held, that although a year had elapsed since judgment had been signed, B's right to appeal was not barred by

489, 23 W. R., 4. Two actions, *Pendlebury v. Greenhalgh*, and *Taylor v. Greenhalgh*, had been brought against a surveyor of highways, to recover damages for injuries sustained in an accident that occurred to them while travelling in the same gig, by reason of the dangerous condition of the highway, which was then under repair.

A verdict was entered for the plaintiff in both actions, leave being reserved to the defendant to move for a nonsuit, on the ground that he could not be legally responsible for the negligence. A rule was accordingly obtained, and in July, 1874, made absolute.

From this decision *Pendlebury* appealed, and the appeal was heard on a special case in accordance with the practice before the passing of the Supreme Court of Judicature Acts, and the decision of the Court of Queen's Bench was on November 8, 1875, reversed.*

Taylor gave due notice of appeal under section 37 of the Common Law Procedure Act, 1874, within four days after the rule had been made absolute. On the 10th of July, 1874, final judgment was signed for the defendant, and in September, 1874, in order to stay execution, *Taylor* paid the costs of the proceedings. The plaintiff did not, however, proceed with his appeal until the appeal in *Pendlebury v. Greenhalgh* had been decided, and took no steps in the matter until he gave a month's notice of appeal on the 18th of January, 1876. The

* See 24 W. R., 98.

facts were brought before the Court of Appeal by the production of a copy of the Judge's notes, pursuant to the Supreme Court of Judicature Act, 1875, Order LVIII. Rule 11.

Order LVIII. Rule 15, as, under the special circumstances of the case, it was a "pending" appeal within the meaning of sect 22 of the Supreme Court of Judicature Act, 1873.

Edwards, Q.C. (Pope, Q.C., with him), for the respondent, said that the notice of appeal was under the old practice, but the appeal had been prosecuted under the new practice, and by the new practice no appeal could be brought a year after judgment had been signed: Supreme Court of Judicature Act, 1875, Order LVIII, Rule 15. [MELLISH, L.J., read section 22 of the Supreme Court of Judicature Act, 1873, and said the only question was whether this was a "pending" appeal.] An appeal could not be "pending" after costs had been paid and judgment signed. In reply to JAMES, L.J., he said he could not contend that under the old practice the plaintiff would not have had a right to appeal.

Ambrose, Q.C. (Gorst, Q.C., with him), said the appeal had been brought pursuant to section 34 of the Common Law Procedure Act, 1854, under which the plaintiff had an absolute right of appeal, subject to the conditions imposed by section 37. That condition had been complied with. Notice was given within four days. [MELLISH, L.J., asked, whether by the voluntary payment of the costs the plaintiff had not waived his notice?] The payment of costs was not voluntary, but compulsory; the plaintiff took out a summons to stay the execution, and his summons was dismissed, and he was forced either to give bail

or pay costs to prevent execution issuing, and he preferred to do the latter. The plaintiff did not prosecute the appeal with great diligence because it was useless that two appeals in the same matter should be proceeding at once. [GROVE, J., asked, whether there had ever been a case of an appeal allowed after judgment signed and costs paid?] There had been many such cases, and they were clearly contemplated by section 42 of the Common Law Procedure Act, 1854. The present appeal became a pending appeal immediately after the notice of appeal was given.

JAMES, L.J., said he thought that this was a pending appeal. There had been two actions brought by two plaintiffs against the defendant on account of the same accident, in both of which a verdict had been entered for the defendant. One of the plaintiffs had appealed, and had been successful in his appeal. While that appeal was going on, it would have been vexatious and oppressive on the part of the other plaintiff to have proceeded with the appeal in his action, of which he had given notice. It was very reasonable to await the result of the other appeal. He asked for time in which to pay the costs of the action, and was refused. He took out a summons to stay execution, and that summons was dismissed, and thereupon he paid the costs, but he did not pay them voluntarily. The proper inference from those circumstances was that the appeal was merely delayed until the appeal by the other plaintiff had been decided.

The COURT allowed the appeal, and made an order on the defendant for restitution of costs.*

SECTION 24.

(*Law and Equity to be concurrently administered.*)

SUBSECTION (2.)

(*Equitable Defences.*)

HIGH COURT OF JUSTICE.—CHANCERY
DIVISION.

(Before Sir J. BACON, V.C.)

Feb. 9th, 1876.

EYRE v. HUGHES.

The bill in this case prayed for a foreclosure, and to have an account against the defendants, the mortgagors, taken without prejudice to certain stipulations for the benefit of the plaintiff, as mortgagee in possession, contained in the mortgage deeds.

The plaintiff had acted as solicitor in certain building transactions for the defendant Hughes, and Thomas, now represented by the defendant Rosling, his trustee in liquidation, and had "financed" the speculation by advancing money to them from time to time in his own name and that of Pinniger, his clerk, on the security of their interest in the property, the deeds being prepared by himself. He had also procured loans for them from some of his clients, the securities having been afterwards transferred to himself. Some of these advances were made on the security of bills of exchange,

A., a solicitor, who had from time to time advanced money to two of his clients, B. and C., to enable them to carry on building transactions, submitted accounts to them, which were signed by them. A. then took a mortgage from them to secure the money already due to him (including untaxed bills of costs) and further advances. The mortgage deed provided that A. might immediately after

* 24 W. R., 311.

the execution of which were discounted by the plaintiff at a commission of 1s. in the pound; a further charge of 5 per cent. being made by the plaintiff when he had to provide for payment of the bills. These sums were all added to the interest-bearing debt, and on the occasion of a mortgage to secure these advances the defendants were called upon to sign the accounts—without, as they alleged, proper opportunity for examination. In February, 1871, upon the occasion of a further mortgage which the defendants were required to sign before any further advance would be made, stipulations were inserted in the mortgage deed by which the plaintiff was to enter into possession of the property, and let and manage it as he should think fit, and to receive a large commission for expenses of management, and for collecting the rents; all these charges when paid by himself, in case of insufficiency of the rents, being added to the principal intended to be thereby secured. A. declined to make any further advances unless B. and C. executed the mortgage deed, which they accordingly did. A. instituted a suit for foreclosure. B. and C. by their answers claimed to have the accounts

enter into possession of the property and let and manage it as he should think fit, and should retain a large commission on the gross receipts as a remuneration, and that if the rents and profits should be insufficient for the payments, A. might apply the same in payment of the interest upon the principal, and should pay the costs, &c., out of his own moneys, and the amount so paid should become part of the principal intended to be thereby secured. A. declined to make any further advances unless B. and C. executed the mortgage deed, which they accordingly did. A. instituted a suit for foreclosure. B. and C. by their answers claimed to have the accounts

The plaintiff having filed his bill for foreclosure and to have the account taken, without prejudice to these stipulations, the defendants by their answer claimed the right to open the whole account, and to have all items charged for commission and discount disallowed, and sums for costs and professional charges which had been included in the security allowed to the extent only of taxed costs out of pocket. Various instances of pressure were alleged by the defendants in support of their case.

The main question was whether this defence was open to the defendants upon the mere averments in their answer, without their having filed a cross bill, or a counterclaim under the Supreme Court of Judicature Act, 1873.

Errors to some extent in the account were admitted by the plaintiff; but his contention was, (1) that the defendants were bound by the signed accounts, unless they filed a cross bill for the purpose of re-opening the whole matter; and (2), that a mortgagee in possession was not precluded from insisting upon stipulations for his own benefit, which had been assented to by the mortgagor.

The case was at issue before the 1st November, 1875.

Fry, Q.C., and *Millar*, for the plaintiff, cited

Richards v. Bayley, 1 Jo. & Lat., 120;

Blagrove v. Routh, 2 Kay & Joh., 509, 518;

Waters v. Taylor, 2 M. & C., 526;

Lord Kensington v. Bouverie, 7 De. G. M. & G., 134, 136;

Chambers v. Goldwin, 9 Ves., 254;

Bonithon v. Hockmore, 1 Vern., 316;

French v. Baron, 2 Atk., 126;

Godfrey v. Watson, 3 Atk., 517;

Nicholson v. Tutin, 3 K. & J., 159;

Also *Fisher's Law of Mortgages*, 2nd edit., vol. 2, p. 890.

Kay, Q.C., and *Bury*, for the defendants, cited

King v. Corke (vol. I, Court Cases, 103);

Lawless v. Mansfield, 1 Dr. & W., 556;

Leith v. Irvine, 1 M. & K., 277, 286;

opened, to have the bills of costs included in the security taxed, and that the plaintiff should be disallowed the sums charged as commission. The suit was in issue before the 1st of November, 1875. Held, that the Court under the Judicature Act, 1873, s. 24, subsection (2), had power to entertain the equitable defence raised by the answers in the same manner as it might have done if a cross bill had been filed under the old practice, or a counterclaim had been delivered under the new practice.

Blagrove v. Routh, 8 De G. M. & G., 620, 692;

Matthison v. Clarke, 3 Dr., 3;

Bertrand v. Davies, 31 Beav., 429;

Barrett v. Hartley, L. Rep. 2 Eq., 789;

Croft v. Graham, 2 De G., Jo. & Sm., 155;

Aylesford v. Morris, L. Rep. 8 Ch., 484;

Broad v. Selfe, 9 Jur. N. S., 885;

Morgan v. Higgins, 1 Giff., 270;

Davies v. Parry, 1 Giff., 174;

Also, Fisher's Law of Mortgages, 2nd edit., vol. 2, p. 893, par. 1621.

BACON, V.C.—Not the least important part of the case which has been argued before me, raises a point which must be decided under the Supreme Court of Judicature Acts. I mean Mr. Fry's argument that the defendant's case cannot be entertained in this Court because he has not filed a cross bill.

Now the 2nd subsection of the 24th section of the statute is plain. Nothing could be more comprehensive, general, and universal than this stipulation. [His Lordship read s. 24, subs. (2) of the Supreme Court of Judicature Act, 1873.] It shall be the duty of the Court, in deciding a cause between two parties litigant, or more than two parties, if a ground of defence or title to relief by way of defence is alleged by the defendant, to deal with it in the same manner as the Court of Chancery would have dealt with it. But it is said that the Court of Chancery would not have dealt with this unless there had been a cross bill filed. The subsequent provisions,

which point out the way in which a defendant having a title to relief may bring that forward by way of counterclaim, and so on, it is not necessary to refer to further for the present case; but it becomes necessary to examine the pleadings of the cause to see whether, in the terms of the subsection, such a defence, or such a title to relief by way of defence, is upon the record as compels the Court to deal with it upon the principles familiar in this Court.

Not only the relation of solicitor and client existed between these parties, but a sort of relation something like that of a banker and customer. The plaintiff received the moneys which were secured by the defendants' mortgage, carried them into account, and applied them in payment of the moneys he had advanced, and of his bills of costs. That pervades the whole of this transaction; that relationship is never in any degree changed.

Now, without putting upon the plaintiff, because he is a solicitor, any further burden than properly belongs to any person who so acted, I cannot forget that he had the duties of a solicitor to discharge to those persons. It was his duty to advise them (and no doubt he discharged it punctually) and to see that, if they executed mortgages to other persons, they did not enter into any other engagements than the transactions warranted. The mortgages to other persons were all at the rate of five per cent. ; the mortgages to the plaintiff were taken at a larger rate of interest, which he had by law a perfect right to exact and take, and his position

as solicitor did not interfere with that right in the slightest degree.

Well, then, the mortgages go on, accounts are stated, and the accounts are of this nature :— The plaintiff by his cashier makes out his accounts ; the defendants Hughes and Thomas are summoned to examine those accounts ; the accounts are laid before them or submitted to them (a variety of expressions are used in the evidence), and ultimately, at the instance of the agent of the plaintiff, and at his request, Hughes and Thomas sign memoranda approving of those accounts, and stating that they had examined them. If that was all in the case no doubt they would be bound by a settled account just as anybody else who, having a full opportunity of examining an account, affixes his name to a memorandum signifying that he has examined and approves of it, is bound. But I do not find a statement in any part of this evidence that there was any examination of the account further than that the defendants' approbation was required to the statement of moneys which had been advanced to them. I do not find any allusion of any kind to bills of costs. There are bills of costs amounting, as the defendants' accountant says—and without adopting it any more than is necessary for this purpose I must for the present assume it to be right—to £600 odd, of which no bill was ever delivered so far as I know. Nobody has ever said that there was, and there was no examination of those bills. Was it not right, that before these defendants should have been called upon

to approve of, or before they were in a situation to examine, these accounts, they should have had the bills delivered to them? There is no pretence for saying that they were ever delivered and the plaintiff himself says—and this is what is called pressure, which he denies to have been pressure, but which the defendants say was pressure—he says, and says it over and over again, that he refused to advance any more money unless they would execute the securities which were tendered to them, the approval of the accounts being a preliminary to the execution of these deeds. That I take to be a clear condition of the case as far as the transactions between the plaintiff and defendants were concerned, and that continued down to the execution of the last of the mortgages. Well, then, that being so, I say it was fair, just, and proper that the bills should have been delivered, and that the cashier or the other gentleman who prepared the accounts and asked the approval of them, ought in his evidence to have said that the item which was represented by the bills of costs was drawn to the attention of the defendants, and if it was not, I am compelled to say that I think the plaintiff, in that instance, did not perform properly the duty he had taken upon himself as solicitor of these defendants.

The bills of costs amount to a considerable sum, and it cannot, I think, be fairly and properly submitted that these bills are not subject to taxation. If they are subject to taxation, and anything should be reduced from them, it would be apparent that there was an

error in the accounts stated. Some errors are admitted. There is an offer to rectify those errors ; but surely as between these parties considering their relations, considering the burden upon the one and the duty which was upon the other, it is not unreasonable to say, although no doubt a large sum of money is due to the plaintiff in respect of large advances made by him for the benefit of the defendants, yet that the way in which that amount is to be ascertained, notwithstanding the execution of the deed under the circumstances in evidence, is still open to investigation ? This is all that I understand the defendants to ask upon this occasion. They do not dispute the execution of the mortgage deed ; they do not dispute the fact of the advances having been made ; but they say that, upon considering the matter, or upon inquiry further into it, they are satisfied that they do not owe him so much as the mortgage deed represents them to be in his debt. But, then, is there any principle upon which I can say that that allegation is not a sufficient title to relief in this Court (in the words of the Supreme Court of Judicature Act, 1873), or is there any necessity, or would there have been before that Act passed, any necessity for a cross bill ? The mortgages are not disputed, but the only thing that is disputed is the sum mentioned in the mortgage deed as the debt, and for that the defendants allege such reasons as appear in their answer why they ought to be re-considered, and why the account ought to be investigated. I think that upon such a state-

ment as I have just now made, the Court would unhesitatingly direct the account to be taken. The Court would not preclude a defendant from, at least, an inquiry into that which he said was his just right. It would not adopt an untaxed bill of costs as a liquidated debt against the wishes of the persons indebted upon that bill of costs, but who had never had an opportunity of seeing it or investigating it, it being the bill of costs of the plaintiff.

Upon the statute, therefore, I am satisfied that I should neglect my duty if I did not attend to that which is alleged by the defendants by way of defence for the purposes I have mentioned. There is no statement of fraud or forgery as to the deed, and no reason why the deed should be set aside, and no claim for that to be done. All that the defendants say is this : There are errors in the accounts upon which we signed these deeds, and we desire to have them set right. The plaintiff to a certain extent agrees that there are errors in the accounts, and he does not dispute, as far as I know, that no bill of costs was ever delivered to these parties during the transactions which occupied the few years covered by these several deeds. I think, therefore, that upon the pleadings, notwithstanding the argument that the Court does not give relief except upon a cross bill, if there had been no Supreme Court of Judicature Act, 1873, passed, the defendants upon the evidence before me would have been entitled to have the account they ask for. I think that under that Act I have no choice but

to say that they are so entitled, and that the account must be taken.

I think that there is a sufficient ground of defence, a sufficient title to relief, pleaded on this record. I am bound upon the evidence to give effect to that claim. There must be an account properly taken of the moneys advanced by the plaintiff, with interest. I think that the costs which are inserted in the accounts and included in the securities must now be taxed, and that the amount when taxed must be included in the plaintiff's securities, and there must be a decree of foreclosure for the amount of what, upon this process being gone through, shall appear to be due. In other respects it will be an ordinary foreclosure account.

The decree directed the following accounts :—

1. An account of principal and interest due to the plaintiff in respect of his advances on the mortgages in the pleadings mentioned, and for his costs of suit, and also his costs properly incurred in respect of the mortgages to be taxed.

2. An account of money laid out by the plaintiff in necessary repairs on the mortgaged property, with interest on the sums so laid out at the same rate as in the mortgages, adding the amount to account.

3. An account, on the footing of wilful default, of rents and profits received, deducting the amount with interest at £4 per cent. from the date of receipt from accounts 1 and 2.

4. An account of money expended in purchase of the reversion, and in taking the

accounts, signed accounts not to be deemed settled accounts. Usual decree for foreclosure.*

COMMON PLEAS DIVISION.

(Before BRETT, ARCHIBALD, and LINDLEY, JJ.)

February 14th, 1876.

MOSTYN, BARONET, v. THE WEST MOSTYN COAL
AND IRON COMPANY (LIMITED).

The declaration, dated 26th October, 1875, under the old system, stated that the plaintiff sued the defendants for that the plaintiff by indenture of lease dated the 25th March, 1874, let to the defendants all and every the coal mines, seams, and beds of coal, cannel, culm, slack, fire-clay, and ironstone under certain parcels of land delineated in a plan thereunto annexed, and containing by estimation 2,211 acres, to hold the demised premises from the 24th of June, 1873, for the term of 60 years thence ensuing, at the rent of 1s. for the first year of the said term, and during the next seven years of the said term at the rent of £1,200 a year, and other rents and royalties by the said indenture reserved, of which rent of £1,200 two quarters were due and unpaid.

The statement of defence and counterclaim, dated 11th November, 1875, under the new system, was as follows:—

“1. The defendants admit that by an indenture of lease dated the 25th March, 1874, the plaintiff

Where in an action for rent due under a lease of coal-mines, in the Common Pleas Division of the High Court, it was shown that the plaintiff had no title to part of the mines, and that he knew that he had none, when he granted the lease, but that the defendants did not know it, and had no means of knowing it, it was held that the deed was to be considered, on demurrer by the plaintiff to the defendants' Statement of Defence and Counterclaim, to have been already

* L. R., 2 Ch. D., 148; 45 L. J. (Ch.), 395; 4 L. T., 211; 24 W. R., 597; W. N., 1876, p. 80.

rectified; that the Statement of Defence and Counterclaim was good, as it disclosed facts which would have justified the Court of Chancery in so rectifying the lease; and that the defendants were entitled to claim damages for the loss which they had sustained by reason of the plaintiff's want of title.

purported to demise to the defendants for a certain term of years therein named, the coal mines, seams and beds of coal, cannel, culm, slack, fireclay, and ironstone, lying upon and under certain parcels of land described therein as containing by estimation 2,211 acres at certain yearly rents therein mentioned, but they do not admit that the contents of such lease are correctly stated in the plaintiff's declaration.

" 2. The defendants admit that under and according to the terms of the said indenture so admitted, half a year's rent in respect of the said demised premises, amounting to the sum of £600, would, but for the matter hereinafter mentioned, have been due and payable from the defendants to the plaintiff, but they deny that they have ever stated any account with the plaintiff of the said moneys, or of any other moneys whatsoever.

" 3. And by way of set-off and counterclaim the defendants claim as follows:— A large portion of the said parcels of land in the said admitted lease mentioned, to the extent of 968 acres, or thereabouts, is situate and lies below the low water mark of the river Dee, and a further large portion of the said parcels, to the extent of 1,000 acres, or thereabouts (no part of which said portions respectively is within a certain manor, therein called the 'Manor of Picton and Axton'), is situate and lies below the high water mark of the said river.

" 4. The defendants, after the making of the said admitted lease, and before the claim made on behalf of the Crown as hereinafter men-

tioned, and without any knowledge or notice of the rights mentioned and referred to in such claim, took a lease from one John, Lord Hammer, for a term of forty years, at a yearly rent of £500, of the mines, seams, and beds of coal, with their appurtenances, lying under 2,270 acres of land; or thereabouts, adjoining the said land in and by the said admitted indenture purported to be demised by the plaintiff to the defendants, and are sinking shafts in the said last mentioned land with a view of working the mines, seams, and beds of coal from under the whole of the lands hereinbefore referred to, through such shafts, and have expended on such sinking of shafts very large sums of money.

“5. On or about the 23rd Aug., 1875, a formal claim on behalf of the Crown was made by the Lords Commissioners of Her Majesty's Woods and Forests upon the defendants, through their secretary, to the coal lying under the said portion of land which is so situate as aforesaid below the low water mark of the river Dee aforesaid, and to the iron lying under the said portion of land which is so situate as aforesaid below the high watermark of the river Dee aforesaid (except any part of such portions respectively as were within the manor of Picton and Axton aforesaid).

“6. The defendants, in consequence of such claim, and believing that the same was, as it in fact is, well founded in truth and law, informed the plaintiff of the said claim, and declined to pay the said rent upon the same being demanded from them by the plaintiff.

“7. The plaintiff at the time when he so made

the said admitted indenture of lease, whereby he purported to demise the said premises so included therein, knew that the coal lying under the said portion of land which is so situate as aforesaid below the low water mark of the river Dee aforesaid, and that the iron lying under the said portion of land which is so situate as aforesaid below the high water mark of the river Dee aforesaid, did not belong to him, and that he had then no right or title to demise the same respectively or either of them respectively, and the defendants had then no knowledge or notice and no means of knowing that the said last-mentioned portions of land respectively, or that either of them respectively, did not belong to the plaintiff or that the plaintiff had then no right or title to demise the same respectively, or either of them respectively.

“ 8. In consequence of the matters mentioned above the defendants are greatly embarrassed and delayed in the working of their said mines as well under the said land mentioned in the said admitted lease as under that mentioned in the said lease so granted as aforesaid by the said Lord Hanmer, and the said last-mentioned lease also is rendered less valuable to them by reason of the said want of title on the part of the plaintiff (such lease having been accepted and taken by them solely with a view of working the mines therein mentioned in conjunction with those which the plaintiff purported to demise), and the defendants have thereby also lost and been deprived of the moneys laid out and expended by them

under and with reference to the said cases respectively, which they would not have laid out and expended if they had known that the coal and iron respectively so lying under the said portions of land below the high and low water mark respectively of the river Dee did not belong to the plaintiff at the time of the making of the said admitted lease, and have lost and been deprived of the interest and profits which would have accrued to them from the use of the moneys so laid out and expended.

“The defendants claim :—

“1. £100,000 damages in respect of the matters stated in the above set-off and counterclaim.

“2. To have the said deed, under which the plaintiff claims, rectified or set aside upon such terms as to this Honourable Court may seem just, and for the purposes aforesaid to have this action transferred to the Chancery Division.

“3. To have such further or other relief as the nature of the case may require.”

The plaintiff demurred to the above statement of defence, set-off, and counterclaim, on the ground that it did not allege that the defendants had been disturbed in the possession of the premises demised by the indenture of lease of 25th March, 1874, and on the further ground that it did not show any right in the defendants to have that lease rectified or set aside, and on other grounds.

Hawkins, Q.C., Philbrick, Q.C., and Dundas Gardner, for the plaintiff, cited *Gilbert v. Lewis*, 1 D. J. and S., 38; and *Story on Jurisprudence*, 11 Edn., vol. 1, pp. 154 and 147.

Sir *Henry James, Q.C.*, Sir *H. Giffard, Q.C.*, *S.G.*, and *R. E. Turner* for the defendants, cited *Line v. Stephenson*, 5 Bing. N.C., 183; *Edwards v. McLeay*, Geo. Cooper's Ch. Ca., 308; 2 Swanst., 287; *Torrance v. Bolton*, L. R., 8 Ch., 118, and *Neale v. Mackenzie*, 1 M. & W., 747; also Platt on Covenants, p. 46, and Sugden's V. and P., 14th edit., 246.

Philbrick, Q.C., in reply, cited *Line v. Stephenson*, 4 Bing. N. C., 678, and *Blandy v. Cartwright*, 8 Ex., 913.

BRETT, J.—This is a demurrer to a statement of defence. The statement of claim is founded upon a lease, and claims two quarters' reserved rent. It avers that the plaintiff let to the defendants a certain coal mine, and that they were to hold the demised premises for a term of sixty years. But it is nowhere averred on these pleadings that there was any covenant in the lease for quiet enjoyment, or for title. The statement of defence has a double aspect; it assumes in the first place to be a good answer to the claim, and, failing that, it assumes to be a good counterclaim. The facts admitted on the pleadings for the purposes of this demurrer are as follows:—A lease is granted of certain mines by one who had no title to part of the mines so demised. He knew at the time that that part did not belong to him, and that he had no right or title to demise it. The defendants say that a defence which sets up such a state of facts is a good answer to a claim for rent, because in such a state of facts a Court of Equity would set aside the lease. The defendants never were in possession of any part of the premises de-

mised, as far as we know now. And no doubt the fact concealed from the defendants was a very material one. Had they known that the plaintiff had no title to part of the demised mines they might very probably have refused to take any lease from him at all. A Court of Equity would set aside the lease under such circumstances if a bill had been filed for that purpose. And the defendants, having been brought into this Court by a claim under the existing lease, claim to be entitled to be treated here on this demurrer as though they had filed their bill, and had the lease set aside. And again, the defendants say, although there has been no eviction, and although that which has been done does not amount to an eviction, we are entitled to say to the plaintiff, you have acknowledged that you have no title to part of the property you pretended to demise to us. You cannot, therefore, insist upon our running the risk of an action of trespass by using that part in accordance with the lease. So we will throw that part back upon your hands, but we will keep possession of the rest. And we will also sue you for damages for your breach of your implied covenant that you had a good title to the whole when you had not.

And here we are met by two points which arise under the Supreme Court of Judicature Act, 1873. By section 34, subsection (3), of that Act, all causes and matters relating to the rectification, or setting aside, or cancellation of deeds, or other written instruments, are assigned to the Chancery Division. But by section 24, subsection

(2), if the defendant claims to be entitled to relief upon any equitable ground against any deed, instrument, or contract, we are bound to give to every ground of relief so claimed such and the same effect, by way of defence, as the Court of Chancery would have given. Hence, no doubt, this Court has power to do this:—If the defendant sets up by way of defence or counterclaim facts upon which the Chancery Division would reform or set aside the document upon which the plaintiff relies, then in the argument of a demurrer to such a defence the Court may treat the document as though it were reformed or set aside.

Another difficulty that has occurred to us is this:—Supposing the counterclaim shows some damage, but obviously not equal to the damage alleged in the statement of claim, is that a good answer as to part of the cause of action? It is not a set-off, for I think here Order XIX; Rule 3, is in point, and shows that a counterclaim is not to be treated as pleas of set-off were before the Supreme Court of Judicature Acts. By this Rule a defendant who has a cause of action against a plaintiff may do either one thing or the other; he may set up his cause of action by way of counterclaim, or he may set it up in a cross-action. The meaning of the Rule seems to be that where a claim and counterclaim are set up in the same action they are both to be treated in the same way. The further result would be this:—Formerly, when cross-actions by agreement were tried together judgment was given on both actions, and execu-

tion issued for the balance, but here judgment would only be for one party. The counterclaim is good if it shows any claim to any amount, on the assumption that the plaintiff is entitled and that the defendants are also entitled to a claim against the plaintiff, and that judgment must be given for the balance. The question is whether the statement of defence shows an answer to the plaintiff's claim or a counterclaim to damages for any amount. If it shows either one or the other the demurrer, which is to the whole statement, is bad, and the statement of defence and counterclaim should be allowed. First, as to whether it shows an answer to the whole of the plaintiff's claim :—The facts alleged are that there was a demise from the plaintiff to the defendants, but the plaintiff knew that he had no title to part of the property demised. It cannot be said that that part was not material to the enjoyment of the other part. The plaintiff did not disclose his want of title to the defendants. There is no allegation that he made any fraudulent misrepresentation, or that they did any act on the faith of it. On these facts, would a Court of Equity set aside the indenture of lease? If so, there is a *prima facie* answer to the plaintiff's claim. I think that the passage which has been cited from Sugden on Vendors and Purchasers (p. 246, 14th edit.) is an authority showing that it is unnecessary to consider in a Court of Equity whether it is fraud to offer, as good, a title which the vendor knows to be defective in point of law. The law is so laid down in *Edwards v. McLeay*,

where Sir William Grant further observes : " if he " (the vendor) " knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser." That case seems to me to be an authority for the proposition laid down in Sugden on Vendors and Purchasers. The best statement of the facts of that case is in George Cooper's Chancery Cases, 308, but the more correct marginal note is that in 2 Swanston, 287, which is as follows :—" An estate having been sold, some part of which, material to the enjoyment of the rest, was subject to a defect of title known to the vendors, but not disclosed by the abstract, and unknown to the purchaser, the contract was rescinded, and the vendors were ordered to repay the purchase money, with all costs and expenses incident to the purchase and conveyance." It seems, therefore, that this statement of defence shows an answer to the action on the ground that the Court must consider the case as if the indenture of lease had been set aside, the defendants never having had any advantage from it. The statement of defence and counterclaim seems also to be good on another ground, for it shows some damage sustained by the defendants. I agree with the doctrine in *Line v. Stephenson*, which is an authority for the proposition that where a deed contains the word " demise " or " let," and there is no express covenant for title or quiet enjoyment, these words contain an implied covenant both for title and quiet enjoyment; but if there be an express covenant

either for title or for quiet enjoyment, the words "let" or "demise" import no covenant. Here we are bound to say that, as the words are "let" and "to hold the demised premises," without any express covenant, there is, therefore, an implied covenant. *Hart v. Windsor* * shows that the word "let" is equivalent to demise. There is, therefore, a covenant for title, but as to part of the property there is no title. I will assume that there was no eviction; it is not necessary to decide this, but it may be that in the case of mines a well grounded claim is equivalent to eviction; however, I will assume that this is not so, and that there was no eviction. Then, there being a demise of the whole at one entire rent, the defendants, are not to be put to the danger of committing a trespass, but before eviction they are entitled to say, "we might insist on giving up the whole, but we will keep what we can and give up the rest;" they may give up what they cannot hold and keep the other part. It is unnecessary to determine whether there can be an apportionment of rent; I am inclined to think that there could, but I will assume there could not. But as the lessor has made a covenant, which has been broken, and he has not given the whole advantage which he covenanted to give, the lessees have suffered some damage, for which they have a right to recover. If this is so, that right may be set up in a statement of defence and counter-claim. Therefore, this statement in the first place

* 12 M & W., 68.

shows an answer to the whole claim, or at least it shows a breach of covenant on which the defendants would have a right to recover some damages. In either case our judgment must be for the defendants on this demurrer.

We do not know what may ultimately turn out to be the rights of the parties, and whether this Division of the High Court of Justice would have any power to reform the lease we do not say; it may be that for that purpose the defendants would have to go to the Chancery Division.

ARCHIBALD and LINDLEY, JJ., concurred.

Judgment for the defendants.*

COMMON PLEAS DIVISION.

(Before Lord COLERIDGE, C. J., and BRETT and
ARCHIBALD, JJ.)

May 11th, 1876.

WAHLBERG v. YOUNG.

*In an action
against the
owner of a tug
by a shipowner
for "improper
navigation,"
the defendant
is entitled to
plead section
54 of the
Merchant
Shipping Act,
1862, limiting
his liability to*

The statement of claim alleged that the plaintiff had hired the defendant's tug "Tuskar," to tow his vessel, the "Ystavat," from Swansea to Cardiff; that throughout the voyage the master of the tug steadily refused to obey the orders of the pilot, and had otherwise neglected to use due and proper care in managing the tug, and so had run the plaintiff's vessel ashore, causing considerable damage to her.

* L. R., 1 C. P. Div., 145; 45 L. J. (C. P.), 401; 34 L. T., 325; W. N., 1876, p. 97; 24 W. R., 401; *Times*, Tuesday, February 15th, 1876.

The statement of defence insisted that the plaintiff should not be allowed to recover more than £776 in this action, that being at the rate of £8 per ton, the gross tonnage of the tug, without deduction on account of engine-room, being only ninety-seven tons. To this the plaintiff demurred. By section 54 of the Merchant Shipping Act, 1862, "the owners of any ship shall not, where, without their actual fault or privity, any loss or damage is by reason of the improper navigation of such ship caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat, be answerable damages in respect of such loss or damage, whether there be, in addition, loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage, such tonnage to be the registered tonnage in the case of sailing ships, and, in the case of steamships, the gross tonnage without deduction on account of engine-room."

£8 per ton of the tug's tonnage, by way of equitable defence, pro tanto, to the action.

Milward, Q.C., and R. E. Webster, for the plaintiff.

Clarkson for the defendant, cited The London and South Western Railway Company v. James, L. R., 8 Ch., 241, and Good v. The London Steamship Owners Association, L. R., 6 C. P., 563. Also to Order XIX, Rule 4, and Order XXVIII., of the Supreme Court of Judicature Act, 1875; and to section 24, subsections (2) and (3) of the Supreme Court of Judicature Act, 1873.

Lord COLERIDGE, C.J.—This action is brought

against the defendant for negligence in performing a contract of towage, which is set out in the statement of claim. The necessary implication of law, arising from such a contract, is that the defendant's servants were bound to use due and proper care in and about the management of the tug and to obey the pilot. For the purposes of this demurrer we assume that they did not use due and reasonable care, and that they disobeyed the pilot, whence damage ensued to the plaintiff's ship. The defendant relies upon section 54 of the Merchant Shipping Act, 1862, to limit his liability under those circumstances to £8 a ton.

The first question which we have to determine is whether such a defence is proper ground for demurrer. Mr. Clarkson has satisfied me that the defence is properly pleaded. The 3rd subsection of section 24 of the Supreme Court of Judicature Act, 1873, and Order XIX, Rule 4, taken together, in effect order a defendant who has a claim that he might enforce in equity to state it in his statement of defence; for it is "a material fact on which the party pleading relies." Under the old practice the defendant would have had a right to go into equity to limit his liability to £8 a ton. This was done in the case (cited to us) of *The London and South Western Railway Company v. James*, where the Court of Appeal in Chancery granted an injunction to restrain all the actions brought against the Company, except those for delay; and the Company paid into Court a sum equal to £15 a ton on the gross tonnage of the

"Normandy," which the chief clerk distributed among the various claimants. But since the Supreme Court of Judicature Acts, the proper, and in fact the only possible, way of claiming such a relief is to plead it in the statement of defence. It follows that, if it is properly pleaded as a distinct ground of defence, it is a proper ground of demurrer under Order XXVIII, Rule 1.

The only remaining question is whether an injury done in the course of the performance of a contract of towage to the vessel being towed by the tug that is towing her is or is not damage caused by improper navigation within section 54 of the 22 & 23 Vict., c. 53. I think it is within both the words and the spirit of it. It has been suggested that cases of contract are not within the statute. But the full Court of Appeal in Chancery have held that they are. Neglect to use due and reasonable care in and about the towing of this ship, and neglect to obey the orders of the pilot as to navigating the tug, are undoubtedly "improper navigation," directly producing as a natural result damage to the vessel towed; and, therefore, section 54 applies, and our judgment must be for the defendant.

BRETT and ARCHIBALD, JJ., concurred.

Demurrer overruled.*

SUBSECTION (3).

*(Equitable Counterclaims and Claims against
Third Parties.)*

CHANCERY DIVISION.

(Before Sir C. HALL, V.C.)

February 25th, 1876.

SHEPPARD v. BEANE.

*It is not
necessary to
give formal
notice to a co-
defendant of a
counterclaim
against him;
it is sufficient
to deliver it to
him. Secus, if
the counter-
claim is
against a
third party.*

This was an *ex parte* application for the direction of the Court as to how a claim between co-defendants should be dealt with. The action was for foreclosure by a second mortgagee against the mortgagor, the first mortgagee, and two sub-mortgagees of the first mortgagee. The claims of the sub-mortgagees alone exceeded the value of the property.

Renshaw, for one of the sub-mortgagees.—We wish to raise a case principally as regards priority against the other sub-mortgagee. There will also be a question of marshalling, but the question of priority is the main point. The Rules of 1875 which seemed to apply to the 24th section of the Act of 1873, are Order XVI, Rules 17, 18 and 19, but they appear to apply only to third parties, and not to co-defendants. If any of those Rules apply, it will probably be the 17th, which provides for the case of a defendant claiming to be entitled to relief against “any other person,” “person” being used in the singular in all those three Rules, but Rule 18 expressly mentions “any person not a party to the action,” while Rule 19, after referring to Rule 17, mentions only “any other

person." But if it should be considered that these Rules do not apply, then the Court must, I submit, revert to the 24th section of the Act of 1873, in the language of which co-defendants and third persons are clearly mixed up together.

HALL, V.C.: I think the provisions which refer to notice must be considered as being applicable to third parties only.

Renshaw: Then the difficulty arises how we are to properly claim by our pleading the relief we seek. We have hitherto pleaded only as against the plaintiff, and we propose to raise the points by way of counterclaim and to take an order, if your Lordship thinks fit to give us one, to deliver the defence and counterclaim to our co-defendant, the other sub-mortgagee.

HALL, V.C., made the following order:—

"His Lordship being of opinion that no formal notice need be given to the co-defendants of the counterclaim, it is ordered, that, besides delivery of the defence and counterclaim to the plaintiff, it be delivered to the co-defendants as well."*

CHANCERY DIVISION.

(Before Sir GEORGE JESSEL, M.R.)

April 7th, 1876.

WARNER *v.* TWINING.

A defendant in this action desired to set up *A counter-*

* L. R., 2 Ch. Div., 223; 45 L. J. (Ch.), 429; 24 W. R., 362; W. N., 1876, March 4th, 1876; 11 N. C., 64.

claim cannot be set up against a third party. a counterclaim for indemnity against another defendant.

A. T. Watson asked for the direction of the Court as to the notice to be served upon the party against whom the counterclaim was made. The Rules did not appear to apply where separate and independent relief was sought by a defendant against a third party, although this case was apparently within the Supreme Court of Judicature Act, 1873, section 24, subsection (3). He referred to *Treleven v. Bray*, L. R. 1 Ch. D., 176.

JESSEL, M.R., said that no counterclaims could be set up which did not seek relief against the plaintiff. The only purpose for which a third party was brought before the Court under Order XVI., Rules 17 and 18, was to bind him by the action, and preclude him from saying that it had not been properly defended.*

SUBSECTION (4).

(All the Divisions of the Supreme Court are to take notice of Equitable Rights appearing incidentally in any Action.)

COURT OF APPEAL.

(Before JAMES, MELLISH, and BAGGALLAY, L.JJ., and MELLOR, J. and CLEASBY, B.)

February 16th, 1876.

HUGHES v. THE METROPOLITAN RAILWAY COMPANY.

Where the This case raised a question of some interest

* 24 W. R, 536. See Appendix (B), Form 1, "Notice by defendant to third party," in the Supreme Court of Judicature Act, 1875, Schedule I.

as illustrative of the "fusion of Law and Equity," or of their administration in the same tribunal. It was an appeal from a decision of the Judges of the Common Pleas Division, refusing an application to grant relief against forfeiture, and to stay, on equitable grounds, execution in an action of ejectment by a landlord for recovery of premises on a forfeiture for non-repair. The case had arisen under these circumstances:—The defendants (the company) were sub-lessees of No. 216, Euston Road, under Colonel Penley, who himself held under a lease granted in 1787. The plaintiff was the reversioner, at a nominal ground-rent of only 10s. a year; but it was held by the company at a rent of £100, and it was re-let at a profit rent of £160. The lease contained a general covenant to repair, and also a covenant to make repairs as required within six months after notice from the landlord. The house was in want of repairs to the extent of about £70; and the plaintiff, on the 22nd October, 1874, gave six months' notice to execute certain repairs required. Thereupon the company proposed, as it was an old lease which had not long to run, that the plaintiff should purchase what remained of it, and a correspondence ensued between the parties as to the price, the effect of which was that the subject of repairs was dropped, and it was not again adverted to until within eight days of April 21st, 1875, when the six months' notice would expire, the plaintiff gave the tenants to understand that the notice would be insisted on. The tenants then commenced to repair; and a

Court of Chancery would relieve a lessee against forfeiture for breach of a covenant to repair, any Division of the High Court will grant the same relief in an action against the lessee in that Division, founded on the breach of covenant to repair. The Court of Chancery would relieve where the landlord has by his conduct misled the lessee into believing that the landlord would not take advantage of the breach.

day or two after the six months expired this action was brought to recover the house as forfeited. At the trial before Mr. Justice DENMAN evidence was given of small repairs being required to the aggregate amount of £70; and on that the learned Judge was strongly of opinion that it was impossible to contend that the house was not out of repair, and, in fact, the jury found that it was substantially out of repair. The company, however, intimated that they should apply, and did apply, to the Common Pleas Division, under Order LIII., to restrain the plaintiff from issuing execution, and to stay all further proceedings on such terms as the Court should think fit; but the Judges—Lord COLERIDGE, C.J., and BRETT and LINDLEY, JJ.—refused the application on the ground that it only raised a case of hardship, which was not a ground of equitable relief. From that judgment the company appealed.

Kay, Q.C. (of the Chancery Bar), with *W. G. Harrison*, argued the case for the appellants, insisting that they had been misled by the plaintiff into believing that the notice was suspended, and that this was a valid ground for equitable relief, which was now available in an action at law. They cited *Bargent v. Thompson*, 4 Giff., 473; *Gregory v. Wilson*, 9 Hare, 683; and *Hill v. Barclay*, 18 Ves., 56.

Murphy, Q.C., with *C. Bowen*, cited *Doe v. Meux*, 4 B. & C., 606, and *Few v. Perkins*, L. R. 2 Ex., 92, and argued that the correspondence had no such effect as alleged, and that, if it had, it amounted to waiver and was a defence avail-

able at Common Law, and ought to have been relied on at the trial; but as to this,

Lord Justice JAMES observed that it tended to revive one of the worst features of the old system—that a party when he went to Law was told that his remedy was in Equity, and when he went into Equity was told that his remedy was at Law. Besides, he had never heard that a party could not raise a Common Law defence at the trial, and then raise a ground of equitable relief, subject only to this, that he might have to pay the costs of the proceedings at the trial.

After full argument,

Lord Justice JAMES said that the Court, no doubt, had no concern with mere hardship, but it was inequitable and unjust that the landlord should take advantage of a forfeiture, when he had, as in this case, lulled the lessees to sleep, and induced them to suppose that the notice to repair was suspended, until a few days before the expiration of the notice, when it was too late to execute the repairs. That was clearly contrary to equity—that is, to justice and conscience, and therefore, it afforded a good ground for equitable relief.

Lord Justice MELLISH concurred, as the plaintiff, the landlord, had, by his conduct, put the defendants off their guard, and led them to believe that the strict legal right would not be insisted on.

Lord Justice BAGGALLAY also concurred, as it was a clear ground of equity that the one party had been misled by the other.

Mr. Justice MELLOR also agreed, because the

effect of the correspondence was that the plaintiff led the defendants to suppose that they might hold their hands.

Mr. Baron CLEASBY, with some hesitation, also agreed.

Judgment for the appellants.*

SUBSECTION (5).

November 27th, 1875.

NEEDHAM v. THE RIVERS PROTECTION AND
MANURE COMPANY.

The Chancery Division will grant an injunction to stay an action in another Division of the High Court of Justice against a company which is being wound up voluntarily in the Chancery Division.

A resolution had been passed for the voluntary winding up of the Rivers Protection and Manure Company, and an action in the Common Pleas Division of the High Court had been brought against the Company by Needham, a creditor.

Glasse, Q.C., and *Burrell*, now moved for an injunction to restrain the action in the Common Pleas Division. They cited *Kingchurch v. The People's Garden Company* (vol. 1, p. 13).

Methold, for the plaintiff in the action, submitted that under section 24, subsection (5), of the Act of 1873, the only Division that could stay the action was the Common Pleas. *Walker v. The Banagher Distillery Company* (vol. 1, p. 13); *In Re The People's Garden Company* (vol. 1, p. 19).

MALINS, V.C., said that, in his opinion, there was nothing in the Supreme Court of Judicature Acts to interfere with the jurisdiction of the

* L. R. 1 C. P., 120, 131; 45 L. J. (C. P.), 578 and 582; 35 L. T., 87; 24 W. R., 652; *Times*, Thursday, Feb. 17, 1876.

Chancery Division with regard to the winding up of companies. In this case the winding up was voluntary, but the Chancery Division was clearly the proper Division for the liquidators or any contributory of the company to apply to, under the 138th section of the Companies Act, 1862. Before the passing of the Supreme Court of Judicature Acts an application to stay the action would have been granted as a matter of course; and finding nothing in those Acts interfering with that power of the Chancery Division, he should grant the injunction asked for. In all cases of winding up he should act as if the Supreme Court of Judicature Acts had not been passed. The Common Pleas Division, however, might, and, indeed, ought to have made an order staying the action, if it had been applied to.*

CHANCERY DIVISION.

(Before Sir GEORGE JESSEL, M.R.)

January 13th, 1876.

FLETCHER v. WOOD.

The bill was filed to restrain an action at law. On November 14th, 1875, the plaintiff moved for an injunction, and the motion was ordered to stand over until the hearing, on the terms of the plaintiff giving judgment in the action; the judgment not to be registered, but

Although the Chancery Division cannot as a rule restrain an action in another Division, it can enforce an

* L. R. 1 Ch. Div., 253; 45 L. J. (Ch.), 132; 33 L. T., 403, 24 W. R., 317. This decision is in accordance with Vice-Chancellor Bacon's decision *In Re Stapleford Colliery Company, Limited*, vol. 1, p. 32. See, also, per Malins, V. C., in *Garbutt v. Faucus*, vol. 1, pp. 23, 24.

*undertaking
by the plaintiff
in the
Chancery
Division, that
the judgment,
when signed,
shall be dealt
with as the
Chancery
Division may
direct.*

to be dealt with as the Court should direct at the hearing, and the order to be without prejudice to any question in the cause.

This was the hearing of the cause.

Waller, Q.C., and *Blackmore*, for the plaintiff.

Chitty, Q.C., and *Barber*, for the defendant, objected that the power of the Court of Chancery to restrain actions in another Court was gone: *Garbutt v. Fawcus* (vol. 1, p. 21, and [on app.] p. 24.)

The MASTER OF THE ROLLS said that he could not restrain the action, but he could enforce the defendant's undertaking that the judgment should be dealt with as the Court should direct.

It appearing, however, that judgment had not been signed,

The MASTER OF THE ROLLS ordered that the cause should stand over until the action should have been tried, and then to come on upon the question of costs.*

COURT OF APPEAL.

(Before JAMES, MELLISH, and BAGGALLAY, L.JJ.)

February 3rd, 1876.

Ex Parte DITTON—*In Re* WOODS.

*The juris-
diction of the
Court of Bank-
ruptcy to
restrain
actions against
trustees in
bankruptcy is
unaffected by
the Judicature
Act, 1873,*

Section 13 of the Bankruptcy Act, 1869, provides that "the Court may, at any time after the presentation of a bankruptcy petition against the debtor, restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt provable in bankruptcy." And by sec. 72, the Court

* 11 N. C., 17; W. N., 1876, p. 16.

of Bankruptcy "shall have full power to decide section 24, sub section (5). all questions of priorities and all other questions whatever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

This was an appeal from an order of Mr. Registrar Hazlitt sitting as Chief Judge in Bankruptcy.

Messieurs Woods were the proprietors of a club called, "The City United Club," situate on Ludgate-hill, and owners of the lease of the club premises. On the 1st of April, 1875, being in difficulties, they obtained an advance of £220 from their solicitor, Mr. Ditton, £180 of which they employed in paying a composition to their creditors. Payment of the £220, with interest at seven per cent. per annum, and of all costs incurred by Mr. Ditton on behalf of Messieurs Woods before the 1st April, 1875, was secured by a deposit of the lease of the premises on Ludgate-hill, and by a memorandum of that date charging the premises with the same. On the 13th July, 1875, Messieurs Woods were adjudicated bankrupts, and the respondent, Mr. W. Edwards, was appointed trustee on the 29th. The trustee entered into a contract for the sale of the club premises on Ludgate-hill for £5,000 and applied to Mr. Ditton for the lease, which he declined to give up unless the debt and costs were paid.

On the 10th September, 1875, Mr. Ditton filed a bill in Chancery against the trustee, praying for a declaration that the memorandum of the 1st of April, 1875, constituted a good equitable security for the sum then advanced and the costs then due, and also that the plaintiff was entitled to a lien on the lease for all further costs due to him from the bankrupts and incurred between the 1st of April, 1875, and the day of adjudication, and for an account of what was due to the plaintiff, and that in default of payment the trustee might be foreclosed or a sale of the property be ordered. The amount claimed by the plaintiff in respect of principal, interest, and costs up to the date of the adjudication of the bankruptcy was £1,270. On December 7th, 1875, upon the application of the trustee, Mr. Registrar Hazlitt granted an injunction restraining Mr. Ditton from proceeding with this suit, and ordered him to deliver up the lease to the trustee; the trustee to be at liberty to complete the sale, and to hand over the lease to the purchaser; after the completion of the sale the trustee out of the purchase-money to bring the sum of £1,270 into Court, to abide the result of any application that might be made by Mr. Ditton. From this order Mr. Ditton appealed.

De Gex, Q.C., and *Warmington*, for the appellant.—By section 24, subsection 5, of the Supreme Court of Judicature Act, 1873, the Court of Bankruptcy has no jurisdiction to grant injunctions restraining proceedings in the High Court of Justice, and such jurisdiction

has not been given to it by section 9 of the Supreme Court of Judicature Act, 1875. [JAMES, L.J.—The jurisdiction of a Court can only be taken away by express words. You must show very clear words in the Act to take away the jurisdiction of the Court of Bankruptcy.] Every branch of the High Court has now jurisdiction to try any question that may arise, legal or equitable. [MELLISH, L.J.—No. The Supreme Court of Judicature Acts have not given the High Court of Justice power to do complete justice in the distribution of the assets of a bankrupt. It cannot decide the whole matter. That can only be done by the Court of Bankruptcy, and that its jurisdiction to restrain proceedings should still exist is strictly in accordance with the principle that the whole of a matter should be determined in one Court.] [JAMES, L.J.—Really the question is not arguable. Why should the Court of Bankruptcy have this power any more than any other Court? Could a County Court before the Act of 1875, or now, restrain proceedings in the High Court?] [MELLISH, L.J.—After the passing of the Act of 1873, I believe it was discovered that this anomaly existed, viz., that County Courts, acting in Bankruptcy matters, had power to grant these injunctions, while the London Court of Bankruptcy had not. That was remedied by the Act of 1875.] The Chancery Division of the High Court cannot grant these injunctions. If the Act of 1875 had never passed, the Court of Bankruptcy would have been a branch of the Exchequer Division, and it could not have been

then contended that its power of granting such injunctions existed. We say the Act of 1875 has made no difference in this respect. *White v. Simmons*, L. R. 6 Ch., 555; *Chichester v. The Marquis of Donegall*, L. R. 5 Ch., 497.

Winslow, Q.C., and *Bigham*, for the trustee, were not called upon.

JAMES, L.J.—The matter is too clear for argument. No jurisdiction of the Court of Bankruptcy is taken away.

MELLISH and BAGGALLAY, L.JJ., concurred.

The case was then argued on its merits, and the respondent consented to an order that, upon payment of £1,270 into Court, Ditton should concur in assigning the lease, and should deliver it to the purchaser.

JAMES, L.J.—With regard to the question of jurisdiction, I desire to add that it is very important that it should be understood that the jurisdiction of the Court of Bankruptcy which existed before the Supreme Court of Judicature Acts still exists, and has not been interfered with by those Acts. Section 24 of the Act of 1873 only enacts rules of administration as between the different branches of the High Court. It should be clearly understood that the jurisdiction of the Court of Bankruptcy remains entirely intact.*

* L. R. Ch. Div., 537; 45 L. J. (Bankruptcy), 87; 34 L. T., 109; W. N., 1876, p. 58; 24 W. R., 289; *Times*, Friday, February 4th, 1876. The decision in this case agrees with that of Mr. Registrar Murray, sitting as Chief Judge, in *Re Alexander Collie and Company* (vol. I., p. 71.)

HIGH COURT OF JUSTICE—CHANCERY DIVISION.

(Before Sir J. BACON, V.C.)

Feb. 12th, 1876.

EDWARDES v. NOBLE.

The bill was filed on the 9th September, 1875, by the plaintiff, Thomas Dyer Edwardes, against the defendant, Charles Noble, for the purpose of obtaining a declaration that the plaintiff was entitled to have an agreement for the purchase of certain farms from the defendant, dated the 3rd of September, 1873, rescinded, and that the defendant was not entitled to make any claim or demand against the plaintiff under the agreement; and for an injunction to restrain the defendant from proceeding with an action for damages which he had commenced against the plaintiff in the Court of Exchequer.

On the plaintiff moving for an injunction at one of the sittings in the Long Vacation the defendant entered into an undertaking, and in October the defendant put in his answer.

The cause now came on for trial.

Kay, Q.C., and *H. Smith*, for the defendants, took a preliminary objection that under the Supreme Court of Judicature Act, 1873, sect. 24, subsection (5), no cause or proceeding pending after the 1st of November, 1875, in the High Court of Justice or the Court of Appeal could be restrained by injunction. They cited *Garbutt v. Fawcus* (vol. 1, pp. 21, 24, 65), and *Fletcher v. Wood* (vol. 2, p. 65).

Sir H. M. Jackson, Q.C., and *Morshead*, for

An action in the Chancery Division for the rescission of a contract for the purchase of land and for an injunction to stay an action for damages for breach of the contract, commenced by the defendant against the plaintiff in the Exchequer Division, was ordered to stand over until after the trial in the Exchequer Division.

the plaintiff, said that they could not dispute the validity of the objection under the statute raised by the defendant's Counsel, but suggested that, as there was a question of title, there should be a transfer of the action in the Exchequer Division to the Chancery Division.

BACON, V.C., directed the cause to stand over to await the trial in the Exchequer Division, the plaintiff having liberty to make such application as he should be advised.

Sir *H. M. Jackson, Q.C.*—In case of an application to the Exchequer Division for the transfer of the action there pending to this Division, would your Lordship object to try the action?

BACON, V.C., intimated that he would not object.*

QUEEN'S BENCH DIVISION.

(Sittings in Banco before Sir A. COCKBURN, C.J., and
ARCHIBALD, J.)

March 25th, 1876.

EDWARDES *v.* NOBLE.

*Same Case.
A Judge of
the Exchequer
Division
having refused
to order the
action there to
be transferred
from that
Division to
the Chancery
Division for
trial before
the Vice-
Chancellor
with the
Chancery*

In this case an application had been made to Mr. Baron HUDDLESTON to transfer the action from the Exchequer Division to the Chancery Division (Vice-Chancellor BACON); but Mr. Baron HUDDLESTON declined to make the order.

J. C. Mathew for the plaintiff in the Chancery suit, now applied for an order to stay the action in the Exchequer Division and transfer it to the Chancery Division, in order that Vice-Chancellor BACON might hear and determine the whole case; otherwise, he urged, this mon-

* W. N., 1876, p. 81; 24 W. R., 390.

strous consequence would follow, that all the expense already incurred in the Chancery suit would be thrown away, although the case was ripe for decision, and the action must be carried to the same stage and all the expense incurred over again; and that, too, although from its nature the question was one of law entirely for the Judge, as it turned on the title.

Willis, for the plaintiff in the action—the defendant in the Chancery suit—resisted the application, on the ground that his claim, being one for damages, was fitter to be determined in an action at Common Law.

The LORD CHIEF JUSTICE.—But still the question will be the same as in the Chancery suit, and it is one with which the Judges of the Chancery Division are, from long experience, specially qualified to deal; and though we are presumed to be acquainted with the doctrines administered in Courts of Equity, it is manifestly more convenient that, until we are all equally imbued with those doctrines, they should continue to be administered by those Judges who are most familiar with them. The whole matter is one which can just as well be determined in the Chancery suit as in the action, and all the expenses have already been incurred in the proceedings in the Chancery suit, while the Judges there are peculiarly qualified to deal with it. It is, therefore, quite proper that the action should be transferred to the Chancery Division.

Order made accordingly.*

* *Times*, Monday, March 27th, 1876. See sections 31, 34, and 36 of the Supreme Court of Judicature Act, 1873.

QUEEN BENCH DIVISION.

(Sittings in Banco before Sir ALEXANDER COCKBURN, C.J.,
and ARCHIBALD, J.)

March 25th, 1876.

HARMAN v. HARMAN.

*The Queen's
Bench
Division
refused to stay
a creditor's
action in that
Division
pending an
administration
action in the
Chancery
Division;
but agreed
to stay the
creditor's
action at the
end of a week,
if the decree
in the adminis-
tration action
shall mean-
while have
been obtained.*

In this case, on the 26th February, 1876, an executor instituted an action in the Chancery Division against his co-executor, in order to have the testator's estate administered, and to charge the co-executor with part of the assets, as lost by his default. On the 28th of the same month a creditor brought his action against the executors on a bill given by the testator. An order had been obtained in the Chancery action for the appointment of a "receiver" to collect and protect the assets, and the plaintiff in that action was in a position to take the usual formal decree for an administration of the assets, which is a matter of course, and on which all actions by creditors would at once be stayed, as otherwise the equal administration of the assets would be prevented, and one creditor might get paid in full while the others would only get a part. The Supreme Court of Judicature Act, 1873, section 24, subsection 5, prevents the granting of injunctions by which actions at law were formerly stayed, leaving actions in the Common Law Divisions to be stayed, as may be found proper, by order of the Division in which they are brought.

G. Henderson (of the Chancery Bar) accordingly applied for an order to stay the creditor's action in this Division, citing a decision of Mr. Justice QUAIN at chambers to the

effect that such an order ought to be made, it having been the established practice in Chancery to stay creditors' actions when the executor was in a position to obtain a decree for administration.—*Geoghegan v. Domer* (vol. I [Chamber Cases] p. 8.)

Willis opposed the application, on the ground that the action ought not to be stayed until a decree for administration had actually been granted.

Henderson pointed out that the decree was merely formal; that the real point was whether the executor was in a position to obtain it, and in this case there was a reason for not obtaining it, because the object was to charge the co-executor, and this would not be so easy after obtaining the decree for administration.

The LORD CHIEF JUSTICE—We have nothing to do with the co-executor. You must get the decree, or the creditor is entitled to go on, otherwise the creditor may be delayed; for suppose the executor does not proceed in his suit?

Henderson.—Then the creditor may be substituted in his place and go on with the suit, and all the creditors in this case are made parties.

Mr. Justice ARCHIBALD—But in the meantime the creditor may be delayed.

The LORD CHIEF JUSTICE.—You must get your decree in a week; otherwise the creditor must be allowed to go on with his action for his debt.*

* *Times*, Monday, March 27th, 1876.

SUBSECTION (7).

(*Multiplicity of Suits shall be avoided.*)

CHANCERY DIVISION.

(Before Sir GEORGE JESSEL, M.R.)

January 19th, 1876.

BARR v. BARR.

Where, pending proceedings in the Probate Division to determine the validity of a will, an action was commenced in the Chancery Division for the appointment of a Receiver over the testator's realty, the M.R. transferred the action in the Chancery Division to the Probate Division, to avoid multiplicity of suits.

An action had been commenced in the Chancery Division for the appointment of a receiver of the rents and profits of a testator's real estate, pending proceedings in the Probate Division to determine the validity of the will.

Begg, for the defendant, moved that the action be transferred to the Probate Division.

Ince, Q.C. (*Whitaker* with him), for the plaintiff, contended that the Chancery Division still retained the old jurisdiction of the Court of Chancery to appoint a receiver while proceedings in the Probate Court were pending.

The MASTER OF THE ROLLS said that one of the evils which the Supreme Court of Judicature Acts were intended to meet, especially as shewn by s. 24, subs. (7), of the Supreme Court of Judicature Act 1873, was that of a multiplicity of proceedings; and that where, in s. 25, subs. (8), of that Act the words "interlocutory order of the Court" were used, they must be understood as referring to an interlocutory order in a pending action.

Order made for the transfer of the action from the Chancery Division to the Probate Division. The costs to be dealt with by the Probate Division.*

* W. N., 1876, p. 44; 11 N. C., 17.

SECTION 25.

(Rules of Law upon certain points.)

SUBSECTION (6).

(Assignment of Debts and Choses in Action.)

COMMON PLEAS DIVISION.

(Before BRETT and ARCHIBALD, JJ.)

May 15th, 1876.

SCHROEDER v. THE CENTRAL BANK OF LONDON.

The statement of claim alleged that one F. W. Henkel drew a cheque for £26. 17s. 6d. upon the defendants' bank "in favour of bearer," and handed it to the plaintiff, who presented it for payment at the bank, but that the defendants, although they had a larger amount of money standing to Henkel's credit in their hands, improperly refused to cash it, and marked upon it "refer to drawer."

It then proceeded as follows: "The plaintiffs say that the said cheque is and was an absolute assignment of the sum of £26. 17s. 6d. to the plaintiffs as a part of the debt owing from the defendants to the said F. W. Henkel, as his bankers aforesaid, and that the presentation of the said cheque to the defendants was an express notice of such assignment, and was accepted by the defendants as such notice."

To this statement of claim there was a demurrer on the ground that a banker, upon whom a cheque is drawn, is under no liability to the holder of the cheque to honour it.

J. C. Mathew (W. Williams, Q.C., with him), for the defendants.—The holder of a cheque has no cause of action against the bank which has improperly refused to cash it. There is no

A suit in Equity could not have been maintained by the holder of a cheque against a bank for dishonouring it, a cheque being a mere order to pay and not an equitable assignment of the whole or part (as the case may be) of the drawer's balance at the banker's; and subsection (6) of section 24 of the Judicature Act, 1873, does not make that a legal assignment, which was not an equitable assignment before the Act came into operation.

privity between them : *Hill v. Royds*, L. R., 8 Eq., 290 ; *Morgan v. La Rivière*, L. R., 7 H. L. Cas., 423, is a strong authority in favour of the defendants. Even in equity a cheque is not an assignment by the drawer of part of his balance at his banker's : *Hopkinson v. Foster*, L. R. 19 Eq., 74, before the Master of the Rolls. The point raised by this demurrer was practically decided by that case.

Wetherfield, for the plaintiff.—That case was decided before the Supreme Court of Judicature Acts came into force. By section 24, subsection (6), of the Act of 1873, privity is no longer necessary between the debtor and the assignee of his debt to enable the assignee to sue. A banker and his customer stand in the Common Law relation of debtor and creditor. According to Mr. Justice Byles, in *Keene v. Beard*, 8 C.B. N.S., 372, a cheque is "an appropriation of so much money of the drawer in the hands of the banker upon whom it is drawn;" it is therefore "an absolute assignment by writing under the hand of the assignor." "Express notice in writing" is given to the debtor as soon as the cheque is presented at the bank; and as soon as they have notice of the assignment, the payee's cause of action is complete. [BRETT, J.—Could the drawer absolutely assign the same thing to two separate people? He could draw two cheques each for the whole balance at his bank, and give one to A. and the other to B.] Then the bank could make A. and B. interplead; that is specially provided for in this same section.

J. C. Mathew, in reply.—A cheque is a mere request to pay; if it were an absolute assignment of the money in the bank, it would be payment out and out.

BRETT, J.—I think that our judgment must be for the defendants, and that this demurrer is good. It is acknowledged that, before the Supreme Court of Judicature Acts, no suit could have been maintained by the plaintiff upon this transaction. The only person who could have sued the bank was the drawer, their customer; and he could not have sued on the cheque. His action would have been for damages for the injury done to his credit and mercantile reputation. The case of *Hopkinson v. Forster* shows that before the Acts the delivery of a cheque was no assignment even in equity of the money in the bank. No suit in equity could therefore have been maintained before the Acts by the plaintiff against the defendants. But Mr. Wetherfield has contended that section 24, subsection (6), of the Act of 1873, has entirely altered the law on this subject, and that what was formerly no ground for a suit in equity is now a good ground for an action at law. Assuming that the Act does purport to amend the law as well as the procedure, I still am unable to see how this subsection has made that which the Master of the Rolls declared to be no assignment an assignment, and, moreover, an absolute assignment. The bank has made a contract with the drawer that they will honour his cheques to the amount of his account. They

break that contract ; how can that give a right of action to a third person ? The cheque is but an order to pay and not an absolute assignment of anything. Moreover, there was no debt to be assigned ; for there is no debt between a banker and his customer till demand has been made. I am of opinion that the Master of the Rolls has already decided this question, and that there is nothing in the new Acts to alter the law which he laid down.

ARCHIBALD, J., concurred.

Judgment for the defendants.*

SUBSECTION (8).

(*Appointment of a Receiver by Interlocutory Order.*)

CHANCERY DIVISION.

(Before VICE-CHANCELLOR HALL.)

December 3rd.

H. v. H.

A Receiver was appointed, ex parte, before service of the writ, on behalf of a widow and orphans, whose property was embarked under a will by the trustees of the will in a business undertaking which was in danger of failure, and in which one

A testator, who died in January, 1870, by his will devised the residue of his property to trustees, upon trust to raise and appropriate thereout a legacy of £15,000, and hold the same upon trust for his daughter and her children. By a codicil he directed that his property should be left in the hands of his executors for seven years, with power to use the moneys issuing therefrom, and deal with matters regarding the sale and otherwise as they thought fit, and within six months from the expiration of such seven years to proceed with the execution

* 34 L. T., 735 ; 24 W. R., 710.

of the provisions of his will. The defendants, *of the trustees had* the only executors who proved, in September, 1870, executed articles of partnership, whereby *blended money* J. J. H., in his own right, agreed to carry on *of his own* the testator's business, and with £3,000 brought in by C. H. H. It was alleged that the bankruptcy of the firm was apprehended, and this action was brought by the infant children of the testator's daughter against the executors for the purpose of having the legacy secured and for a receiver of the business and of the testator's estate.

Dickinson, Q.C., and *Bryce*, applied *ex parte* on behalf of the plaintiffs for the appointment of a receiver (named in Court), before service of the writ.

HALL, V. C., made the order, the person appointed receiver to give the usual receiver's security within ten days, and the plaintiffs' undertaking to accept any notice of motion to discharge the order; this undertaking to be notified to the defendants when the writ was served.*

CHANCERY DIVISION.

(Before Sir GEORGE JESSEL, M.R.)

January 11th, 1876.

SARGANT v. READ.

The action was brought on the 1st of January, 1876, to take the accounts of a dissolved partner- *A Receiver was appointed at the instance*

* L. R., 1 Ch. Div. 276; 24 W. R. 317.

of the defendant, before judgment, although the plaintiff had already given notice of motion for the appointment of a Receiver.

ship, and for the appointment of the plaintiff, W. J. Sargant, as receiver.

On the 7th of January, 1876, the plaintiffs gave notice of motion, accordingly. On the 8th of January the defendant gave notice of motion for the same day, for the appointment of a receiver.

Chitty, Q.C., and *Crossley*, for the defendant, moved for a receiver pursuant to the notice of motion given on the 8th instant. They submitted that a motion by a defendant for a receiver, though formerly irregular (*Robinson v. Hadley*, 11 Beav., 614), was now sanctioned by Order LII., Rule 4.

Cookson, Q.C., and *Rawlins*, for the plaintiff, opposed, and asked for the appointment of the plaintiff, W. J. Sargant, as receiver.

The MASTER OF THE ROLLS thought the Rule was intended to enable the Court to appoint a receiver at the instance of the defendant in a proper case, without obliging him to take the preliminary step of issuing a writ in a cross action. He should make one order on both motions, and give the carriage of it to the plaintiffs, as being those who instituted the first proceedings. As a general rule, he would not appoint one of the parties a receiver. But as this was a business [that of colonial and metal broker] of a personal nature, and the plaintiff, W. J. Sargant, was largely interested in its success, he would appoint him receiver.*

* L. R., 1 Ch. Div., 600; 45 L. J. (Ch.), 206; 11 N. C. 6.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(Before Sir J. HANNEN, J., President.)

*March 7th, 1876.*BRAND v. MITSON (*otherwise* BRAND).

Alfred Brand, farmer, of Great Finborough, Suffolk, died intestate on the 5th of January, 1876. The defendant, who claimed to be the lawful widow of the deceased, was in possession of his personal estate, and it was alleged by the plaintiff that she had converted into money a large portion of it. The plaintiff was the father of the deceased, and denied that the defendant had ever been married to him. On the 19th of January, 1876, he entered a *caveat*. A warning was entered by the defendant on the 25th, and on the 31st of the same month an appearance was entered by the plaintiff. The plaintiff then issued a writ of summons, but it had not yet been served.

An injunction was granted, ex parte, before service of writ, to restrain the defendant from dealing with the estate of an intestate, whose widow she claimed to be, and of whose personal estate she had possessed herself, her claim being denied by the intestate's next of kin.

Bayford, for the plaintiff, moved *ex parte* for the appointment of an administrator *pendente lite*, or, as there might be some difficulty in serving the writ, for an injunction to restrain the defendant from disposing of or removing any part of the estate. The Supreme Court of Judicature Act, 1873, s. 25, subsection (8), was applicable to this case.

HANNEN, J.—I shall issue an injunction in the form asked for, until further order of the Court. That is the proper course to be pursued in the absence of the defendant. The defendant

will have the opportunity of coming to the Court to move to dissolve it.*

COURT OF APPEAL.

(Before JAMES, MELLISH, and BAGGALLAY, L. JJ.)

March 16th, 1876.

TAYLOR v. ECKERSLEY.

On an ex parte application by plaintiff, before defendant's appearance, for the appointment of a Receiver in an action for the specific performance of a verbal agreement by defendant to execute a bill of sale of his furniture, there being imminent danger of the defendant's bankruptcy, the usual order was made by Bacon, V.C., for a reference to chambers to appoint a Receiver. The Court of Appeal added to the order an appointment of the plaintiff

On the 13th of March, 1876, the plaintiff issued his writ, endorsed with a claim for the specific performance of a verbal agreement by the defendant to execute to the plaintiff a bill of sale of his furniture to secure the plaintiff against liability upon a promissory note for £850, in which he had joined with the defendant to enable him to raise money. The plaintiff alleged that he had signed the promissory note on the faith of the defendant's promise to execute the bill of sale which he now refused to execute. The defendant had not appeared, and no statement of claim had been delivered.

The plaintiff moved *ex parte* for an injunction to restrain the defendant from parting with the furniture, and for the appointment of a receiver; and in support of his motion made an affidavit of his belief that the defendant would sell or dispose of the property unless restrained from so doing.

BACON, V.C., granted the injunction, and ordered a reference to chambers in the usual way to appoint a receiver, refusing the plain-

* 45 L. J. (P. D. & A.), 41; 34 L. T., 854; 24 W. R., 524.

tiff's application that he might himself be immediately appointed receiver.

Russell Roberts now asked for an immediate appointment of a receiver to take possession at once of the property and protect it, which a receiver, appointed under the Vice-Chancellor's order, could not do, till he had completed his security. *Edwards v. Edwards*, L. Rep., 1 Ch. D. W., 454; on appeal, L. R., 2 Ch. D., 291. Unless this application were granted, the object of the action might be wholly defeated. A letter from the plaintiff's country solicitors which was not in evidence, showed that there was danger of the plaintiff becoming bankrupt. He referred to the Supreme Court of Judicature Act, 1873, s. 25, subsection (8); and to the Rules of the Supreme Court, Order LII., Rule 4.

The Court added to the Vice-Chancellor's order a direction appointing the plaintiff to act as *interim* receiver, without security, for fourteen days, or until a receiver should be appointed under the Vice-Chancellor's order; the plaintiff, through his Counsel, undertaking not to deal with the furniture except under the direction of the Court, and to abide by any order which the Court might make as to damages, or otherwise.*

* L. R., 2 Ch. Div., 302; 45 L. J. (Ch.), 527; 34 L. T., 637; W. N., 1876, p. 115; 11 N. C., 70.

to act as
interim
Receiver with-
out security,
for fourteen
days, or until
a Receiver
should be
appointed
under the
Vice-Chan-
cellor's order.

SECTION 31.

(Divisions of the High Court of Justice.)

HIGH COURT OF JUSTICE.—QUEEN'S BENCH DIVISION.

(Sittings in Banco, before the LORD CHIEF JUSTICE, and
QUAIN, and ARCHIBALD, JJ.)

March 22nd, 1876.

PACEY AND WIFE v. THE LONDON TRAMWAY COMPANY.

*The Divisions
of the High
Court of Justice
are so far to be
deemed still
distinct and
separate, that
the Judges sit-
ting in one
Division are
bound, in an
action in any
other Division,
to follow the
decisions of the
Judges of that
Division, even
although
against their
own opinion.*

The plaintiffs in this case—husband and wife—sued for an injury to the wife caused by an accident on the tramway, and they brought their action in the Exchequer Division. They had applied at chambers to Mr. Baron POLLOCK for an order to inspect a report of their surgeon, who had seen the injured party. But on this point there has been, unfortunately, a serious difference of opinion between Courts, and that difference still subsists between the Judges of the different Divisions. Two of them—the Queen's Bench and the Common Pleas—are in favour of allowing such an inspection, but the Exchequer have been against it. The learned Baron refused the order for inspection. From that decision the plaintiffs now appealed.

Clay, on their behalf, brought the authorities fully before the Bench, and claimed that the latest authorities were in his favour, and especially the decisions of the Judges of this Division and of the Judges now constituting the Court.

Humphreys, for the defendants, relied on the view of the Exchequer Judges.

THE LORD CHIEF JUSTICE said that as this was an Exchequer cause, they were bound to follow the decision of the Judges of the Exchequer Division.

Clay urged that all the Divisions now constituted one High Court, and were not separate Courts.

THE LORD CHIEF JUSTICE.—Practically they are separate Courts. Suppose while the Judges are on Circuit a Divisional Court is constituted *in banc*, and an Exchequer case is brought before it, and it so happens that no Exchequer Judge is present, still the Court, though constituted without an Exchequer Judge, is a Division for taking Exchequer cases, and is for that purpose to be considered as the Exchequer Division.

Clay cited an observation of Mr. Justice BLACKBURN in a recent case on the subject, that now the Chancery authorities must be considered by the Judges of the Common Law Divisions, on the ground that all the Divisions constitute one Court, and he urged that this being so, the latest decisions of any Division of the Court must be considered as binding, and that these were in favour of the application. He especially relied on a recent decision of the Master of the Rolls.

THE LORD CHIEF JUSTICE.—As the decision of the Exchequer was not binding on the Master of the Rolls, so neither is the decision of the Master of the Rolls binding on us.

Clay urged that the Master of the Rolls had distinctly extended the rule as laid down by the Exchequer, and even the view taken by

this Division in favour of inspection, and had allowed inspection of a report or account of the transaction made to the other party by his agent abroad.

The LORD CHIEF JUSTICE.—If that case had been before me, I should not have so decided. Your proper course is to go to the Court of Appeal.

Clay observed that perhaps his clients could hardly afford to encounter the expense of an appeal.

The LORD CHIEF JUSTICE said that the Court could not consider that, and he added that, as for the reasons he had mentioned it was important to know to what Division any cause belonged, it was desirable that it should be stated in the list of causes to which Division actions respectively belonged.*

SECTION 34.

(Assignment of certain business to particular Divisions of the High Court.)

See under sections 31, 36, & 39 of the Supreme Court of Judicature Act, 1873.

SECTION 36.

(Power of Transfer.)

QUEEN'S BENCH DIVISION.

(Sittings in Banco, before the LORD CHIEF JUSTICE and
ARCHIBALD, J.)

NELSON AND ANOTHER *v.* THE SINGAPORE
STEAMSHIP COMPANY.

An action in

This was a curious case, which raised a ques-

* *Times*, Thursday, March 23rd, 1876.

tion of some interest as to the operation of the Supreme Court of Judicature Acts, with reference to the transfer of causes from one Division to another. It was a claim of £4,000 as due from the company to the plaintiffs under an agreement alleged to have been made with the master of one of the plaintiffs' ships by the master of one of the company's ships for the conveyance of passengers from a place on the Red Sea to Jeddah, in Arabia. This unusual claim was made under these circumstances. On the 30th of September, 1875, the "Medina," one of the company's steamers, while on a voyage from Singapore to Jeddah with a general cargo, and having on board 550 passengers (Mahomedan pilgrims) who had embarked at Penang for Jeddah, was wrecked on a small sharp rock in the Red Sea, and the pilgrims were landed by the "Medina's" boats on the rock, which is about 30 miles from the mainland and about 240 miles from Aden, and from two to three days' voyage from Jeddah. The "Medina's" boats were so knocked about in landing the pilgrims on the rock as to be useless, and the lives of the pilgrims, for whom there was scarcely standing room on the rock, were exposed to danger. On the 1st of October the master of the "Medina" observed a steamer, which turned out to be the "Timor," bound on a voyage from Kurrachee to Liverpool, and made signals of distress, which were observed by the "Timor," and she altered her course and bore down to the rock. When she approached the rock the master of the "Medina" went on

the Exchequer Division, ostensibly founded on contract, but likely to prove an action of salvage, having been transferred to the Admiralty Division by a Judge at chambers, the Court refused to re-transfer it to the Exchequer Division.

board of her and told her master the position of the pilgrims, and asked him to render assistance. Thereupon negotiations commenced between the master of the "Timor" and the master of the "Medina." The master of the "Timor" refused to take the pilgrims from the rock to Jeddah for less than £4,000, and the master of the "Medina" offered £1,500, and subsequently £2,000 to the master of the "Timor" for his services. It was alleged by the plaintiffs that there was then an agreement entered into between their captain and the company's that they should receive £4,000 for the carriage of the pilgrims. On the part of the defendants it was alleged that, their offers being refused, they proposed to refer the amount to arbitration, and that this proposal was rejected, and that then the defendants were forced to acquiesce in the demands, and to sign the agreement relied on by the plaintiffs. The "Medina" was totally lost, and the action was brought in the Exchequer Division to recover the £4,000. The defendants alleged that the sum of £4,000 was not a reasonable amount for the services to be rendered by the "Timor," but was an exorbitantly excessive amount for such services; that the master of the "Timor," in procuring the master of the "Medina" to sign the agreement, took undue advantage of the position in which the master of the "Medina" and the pilgrims were placed; that the master of the "Medina" had no authority to enter into the agreement on behalf of the defendants; and that it was extorted and improperly obtained

from the master of the "Medina," and was wholly unjust and inequitable; but that the defendants were ready and willing to pay to the plaintiffs a reasonable sum for their services. Before any statement of defence had been delivered Mr. Justice QUAIN had made an order to remove the case from the Exchequer to the Admiralty Division. This was an application on the part of the plaintiffs to bring the case back into the Exchequer Division.

Watkin Williams, Q.C. (*Grantham* with him), appeared for the plaintiff in support of that application; *L. P. Russell*, for the defendants, appeared against it.

The argument of *Williams, Q.C.*, in support of the application to bring the case into the Exchequer Division was, in substance, that it was a case eminently fit to be tried by a jury, especially as the defence set up was that the sum claimed was exorbitant and excessive, and that the contract was obtained by taking an undue advantage of the position of the pilgrims.

The LORD CHIEF JUSTICE observed that cases of salvage belonged properly to the Admiralty, and the policy of the Supreme Court of Judicature Acts seemed to be to retain to the Judges of each Court the jurisdiction over classes of cases with which they had been peculiarly conversant. Moreover, there was an express provision that the Admiralty Division should still have the jurisdiction in cases in which the Court of Admiralty had before had exclusive jurisdiction.

Williams, Q.C., urged that but for a statute in

our own times the Court of Admiralty would not have had jurisdiction in case of contract.

The LORD CHIEF JUSTICE.—But supposing the contract to be got rid of on any ground, then it would become only a question of salvage, such as would have belonged to the Admiralty Court.

Williams, Q.C., urged that there was no real ground set up to get rid of the contract. Mere exorbitancy would not be enough without fraud or duress; but as to this——

The LORD CHIEF JUSTICE observed that a man would naturally be obliged to promise anything demanded of him in order to save the lives of 500 human beings stranded on a barren rock.

Williams, Q.C., admitted that if the defendants' master was actually forced by physical necessity to enter into the contract, then the contract would not be binding, as there would be no real assent.

The LORD CHIEF JUSTICE.—If the amount claimed was unreasonable.

Williams, Q.C.—Then on the question of what would be unreasonable, surely a special jury of merchants would be the best possible tribunal.

Mr. Justice ARCHIBALD pointed out that in the Admiralty Division two Masters of the Trinity House would sit as nautical assessors, and in all probability they would know all about the navigation of the Red Sea.

After some further discussion,

The LORD CHIEF JUSTICE said—We are strongly of opinion that the Admiralty Division, with the assistance of its nautical assessors—two Masters of the Trinity House, of consider-

able knowledge and experience—will be best fitted to deal with such a case. No doubt a special jury would deal with it very well if it were not that, if the contract is got rid of, it will become a question of salvage, which has always been peculiarly for the Admiralty, as it depends on the value of the services rendered at sea, turning on all the circumstances of the case, which nautical men can best judge of. It seems to have been intended that such cases should still lie within the jurisdiction of the Admiralty Division, and we should certainly not transfer a case from a Court which formerly had exclusive jurisdiction in such cases, and we should rather be disposed to remove a case into such a Court, or Division of the Court. We think, therefore, that the order to remove this case into the Admiralty Division was right, and that it should remain in such Division.

Mr. Justice ARCHIBALD concurred.

The application, therefore, to set aside the order, was dismissed.*

QUEEN'S BENCH DIVISION.

(Before the LORD CHIEF JUSTICE and Mr. Baron POLLOCK.)

April 10th, 1876.

DOERING v. LABOUCHERE.

This was an application to transfer to the Chancery Division an action in this Division involving a part of the subject matter of a suit *Where an administration suit had been commenced in*

* *Times*, Tuesday, March 28th, 1876.

the Chancery Division, an action in the Queen's Bench Division by the widow of the testator against a trustee of the will, to recover shares which were alleged to form part of the testator's property, was transferred to the Chancery Division.

already commenced and now pending in the Chancery Division. A gentleman named Doering died, leaving his widow provided for by will. His property, consisting chiefly in shares, was left to her for life, and after her death to a female child, which necessarily involved a trust in order to protect the interest of the child and preserve the property for her. The widow had acquired other shares, as was suggested, out of trust funds which the trustees had allowed her to deal with. The child had instituted an action in the Chancery Division against the widow and the trustees for the purpose of administering the trusts of the will, and in this suit it was suggested that there had been some misappropriation of trust funds by the widow with the consent of the trustee. Most of the shares were in the hands of one of the trustees, and the widow and the trustee in their statement of defence in the Chancery suit fully entered into the matter of the shares. The widow, however, after the statement of defence had been delivered, began an action in this Division against the trustee to recover the shares. Mr. Baron POLLOCK had made an order at chambers to transfer the action in this Division to the Chancery Division, on the ground that the action was quite unnecessary, as the Chancery Division could well dispose of the whole matter. The widow, the plaintiff in the action, applied on the 3rd inst. to set aside the order and allow the action to proceed, on the ground that it was quite distinct from the Chancery suit, at all events as to some of the shares, as they had,

it was alleged, been purchased by the widow out of her own funds, and were quite distinct from the trust property under the will; but she only at first made a general affidavit that the shares were not affected by any trust. The Lord Chief Justice was by no means satisfied with the lady's affidavit, and directed the matter to stand over, with leave to her to file fresh affidavits.* Long affidavits were accordingly filed on both sides, the widow stating that she had purchased some of the shares out of her own funds, but not stating how she had acquired those funds; and on the other side it was insisted that some of the shares were the very shares which had belonged to the testator, and were, beyond all doubt, bound by the trust; and as to the others it was suggested that they had been purchased out of trust funds, and were liable for misappropriation of trust funds. The case now again came before the Court, and it was argued at some length.

Willis, on the part of the widow, the plaintiff in the action in this Division, urged that her action to recover the shares ought to be allowed to proceed, as it was separate from the trusts.

Channell, on behalf of the trustee, the defendant in the action in this Division, contended that this was itself a question in the Chancery suit, and that the Judge's order to transfer the action into the Chancery Division was right, because two suits were unnecessary.

In the course of the discussion,

The LORD CHIEF JUSTICE asked, why the

* See the case reported, *Times*, Tuesday, April 4th, 1876.

Chancery Division should not determine this question as well as any other which might arise?

Mr. Baron POLLOCK also observed that the question might have been decided before this on an application by the lady to have the shares delivered to her.

The LORD CHIEF JUSTICE added that it would involve additional expense—which was unnecessary—to allow this action to proceed.

After full discussion,

The LORD CHIEF JUSTICE said—The whole matter may well be disposed of in the Chancery suit, where the main subject of litigation is pending. The order to transfer the action to the Chancery Division was therefore right, and need only be varied so far as to allow to the lady any of the costs of the action which may have been thrown away by reason of the transfer, because she had a right to bring the action in this Division, although it would be more conveniently decided in the Chancery Division; but the present application must be discharged, with costs, as against the order of a Judge, according to the ordinary rule.*

QUEEN'S BENCH DIVISION.

(Sittings in Banco before BRAMWELL, B., BRETT, and QUAIN, JJ.)

April 12th, 1876.

HANNEN v. HANNEN.

Where an administration suit had been

This was an application in a matter already in the Chancery Division, to transfer a second

* *Times*, Tuesday, April 11th, 1876.

action on the same matter to that Division. An administration suit had been instituted in the Chancery Division by one executor against another, and also against one of the creditors, a legatee under the will of the deceased debtor. The executor who sued in Chancery alleged some loss of assets by the default of his co-executor, and also claimed to retain assets to satisfy a debt due to himself from the testator. A receiver had been appointed to take care of the assets, the result of which was that the executors could not pay the creditors and that an execution could not be levied. The creditor, who was a party to the administration suit and held a note of the deceased, instituted an action on the note against the executors, and meanwhile obtained time to answer the statement of claim in the Chancery Division, so as to prevent the decree for administration from being obtained. The executor who instituted the Chancery suit thereupon applied to this Court to stay the action, but the application was opposed, on the ground that there had been no decree in the administration suit, and the Court on that ground declined to stay the action, but allowed the plaintiff in Chancery a week's time to get the decree.

Henderson (of the Chancery Bar) now, on the part of the executor, who instituted the administration suit, applied under the Supreme Court of Judicature Acts for an order to transfer the action. [Mr. Baron BRAMWELL said his difficulty was this, that the plaintiff in the Chancery suit might not be able to obtain his decree. The

commenced in the Chancery Division, an action in the Division by a creditor of the testator on a promissory note of the testator against his executors was transferred to the Chancery Division.

then creditor, who was a party to the administration suit, might himself obtain the decree and get the assets administered. But the creditor may prefer a Common Law judgment to a right to administration in Equity.] The judgment would be useless as the assets were locked up in the Chancery suit, and no execution could be levied. The action was, therefore, utterly useless.

Willis, for the creditor (the plaintiff in the action), argued against the transfer.

The COURT acceded to the application.

Mr. Baron BRAMWELL said,—I think the order should be made to transfer this action to the Chancery Division, and I think the very fact that the plaintiff in Equity, for a technical reason, has not yet been able to obtain the formal decree for administration rather affords an argument in favour of the application. It is quite certain that no question can arise in the case in this Division which cannot also be raised and decided in the Chancery suit. And is it to be contended that every creditor may bring his action, and incur, and cause to be incurred, a quantity of costs fruitlessly and uselessly? For there can be no doubt that at some time in the course of the Equity suit, the action here will be stayed, and the only effect of the creditor going on here will be that costs will be thrown away. Under these circumstances it does seem that we ought to avail ourselves of the power which we have under the Supreme Court of Judicature Acts, to send the matter into the Division where the general

question between the creditors and the executors may be settled. We ought to send it to that Division which, having the control as well over the equitable administration as over the particular action, can settle the whole. And, therefore, we must accede to the application.

Mr. Justice BRETT said,—I am of the same opinion. I think that the meaning of the Supreme Court of Judicature Acts is that there shall not be concurrent suits in different Divisions on the same subject of dispute. And I think that the reason applies where the dispute in one Division is only a part of the subject of dispute in the other. Here there is in the Chancery Division a suit for the administration of an estate, and in the suit several questions may arise, and, among others, it is suggested that one of the executors has wasted assets; and if he has, he will have to make good the moneys wasted, and when that is settled, there will be an administration of the assets among the creditors. There may be many disputes as to these claims, and, among others, as to the creditor suing in this action, and who is claiming to be a creditor. His claim may or may not be disputed. If it is disputed, it can be determined there as it could be decided here; and that being so, there are concurrent suits on the same subject; and, inasmuch as the Chancery suit is the longer and the more comprehensive, it seems to me to be the meaning of the Supreme Court of Judicature Acts that we should not allow a lesser suit practically to determine part of the subject

matter of a more comprehensive suit to go on here, when, if it does go on here, it must afterwards go there to be finally determined. Therefore, it seems to me that the very meaning of the Supreme Court of Judicature Acts is, that if part of the matter is made the subject of a suit here, it ought to be transferred to that Division in which there is a suit comprising the whole. It has been argued that the Court of Chancery would not have stayed the action at this stage, but it does not appear to me that the power of transfer is limited to cases where the suit to be transferred could have been stayed. It seems to me that under the Supreme Court of Judicature Acts there is another and an additional power to transfer suits, and that in this case for these reasons we ought to exercise the power.

Mr. Justice QUAIN.—I am of the same opinion. The only objection made to the order for transfer has been satisfactorily answered by my Brother BRETT. The Court of Chancery used to stay actions on a decree for administration being obtained, because it was deemed that the decree was for the benefit of the particular creditor in common with all the other creditors. The question is, whether, when for some reason a decree has not been obtained, the party has not an additional remedy by means of a transfer of the action to the Chancery Division where the administration suit is pending; and it seems to me that it is so, because in the Chancery suit the same investigation may be made as in the Common Law action, whereas the latter

action is confined to the claim of the particular creditor. So soon as we can see that the litigation in Chancery will cover and include the litigation in the Common Law action, the spirit of the Supreme Court of Judicature Acts requires that we should exercise our power to transfer the action to the Chancery Division, in order that the whole matter may be determined.

Order to transfer the action ; the costs of the application to be costs in the cause.*

QUEEN'S BENCH DIVISION.

(Before SIR A. COCKBURN, C.J., and QUAIN, J., and
POLLOCK, B.)

April 11th, 1876.

COODE v. HARRISON.

This was an application to transfer an action commenced in the Exchequer Division to the Chancery Division. In December, 1875, an action was commenced in the Chancery Division by Harrison against Pearce, to set aside, on the ground of fraud, a contract for the sale of a mine, for which £5,000 was to be paid—£1,000 in cash, and £4,000 in bills—which had been given. In January, 1876, the statement of claim was filed in that action, and in February the statement of defence. In January, Messrs. Coode, who are bankers and solicitors, and who were the solicitors of Pearce in the Chancery

Where A. B. had commenced a Chancery suit against C. D. to set aside a contract for the sale of a mine, on the ground of fraud, and E. F. and G. H., C. D.'s solicitors, brought an action against A. B. in the Queen's Bench Division on one of the Bills of Exchange

* *Times*, Thursday, April 13th, 1876.

which A. B. had given to C. D. in part payment of the contract price, the Queen's Bench Division refused to order the action in that Division to be transferred to the Chancery Division, E. F. and G. H. having made an affidavit that they took the Bill from C. D., their client, without fraud, four months before the Chancery suit.

suit, commenced an action against Harrison in the Exchequer Division on one of the bills given by him to Pearce. An application was made to a Judge at chambers early in March to transfer the action to the Chancery Division, but the learned Judge, Mr. Baron POLLOCK, declined to make the order, and from this decision Harrison, the plaintiff in Chancery, now desired to appeal. In the meantime, he having, by means of the action, found that the Messrs. Coode were the holders of the bill, he made them parties to the Chancery suit, alleging that they had taken the bill from their client, Pearce, with notice of the fraud. They, on the other hand, made an affidavit that they took it in July, 1875, *i.e.*, four months before the suit, and without any notice of the fraud.

Humphrey (of the Chancery Bar) appeared for the plaintiff in the Chancery action, the defendant in the action in the Exchequer Division, in support of an application to transfer the action in the Exchequer Division to the Chancery Division, and urged that it was entirely contrary to the policy of the Supreme Court of Judicature Acts to allow different actions for the same cause. The question was as to the bills; and here the plaintiffs in the action in the Exchequer Division were made parties to the Chancery action. [The LORD CHIEF JUSTICE.—But, why should they be made parties to the Chancery action?] If it could be shown that they had notice of the fraud, the plaintiff in the Chancery action would be entitled to have the bill delivered up. It was

impossible to make the Messrs. Coode parties to the Chancery action before it was known that they held the bill, and then they were made parties. There were three other bills outstanding, the holders of each of which could be equally made parties to the Chancery action, but each of whom might bring separate actions, so that there might be four different actions besides the Chancery action, all arising out of the same transaction. Surely this would hardly be carrying out the policy of subsection (7) of section 26 of the Supreme Court of Judicature Act, 1873, the object of which was to prevent multiplicity of suits. [The LORD CHIEF JUSTICE observed that there was an affidavit that the plaintiffs in the Exchequer action took the bill before the Chancery action and without notice of the fraud.] This was the very question to be determined in the Chancery action, and it could not be tried on affidavits. It must be assumed that each Division of the Court was competent to administer its jurisdiction, and here the Supreme Court of Judicature Acts gave the plaintiff his option as to the Division in which he would bring his action, and the plaintiff in the Exchequer action was made a party to the Chancery action. [The LORD CHIEF JUSTICE said the power in one Division to transfer causes to another was discretionary, and the discretion could not be exercised except upon a knowledge of the nature of the case to be derived by affidavits, and what answer was there to the affidavit of the plaintiffs in the Exchequer action that they took the bill without

notice?]

The answer must depend on the examination of the parties in the Chancery action, and, as it stood, there was the suspicious circumstance that the plaintiffs were the solicitors of Pearce. But the case could not be tried on affidavit. If this course could prevail then a party sued in Equity could easily divert the jurisdiction by indorsing the bills in controversy. Before the Supreme Court of Judicature Act cases of this kind were peculiarly within the jurisdiction of Equity, and Courts of Equity would stay by injunction actions on the bills which were the subjects of the suits in Equity, and it was never intended, surely, to multiply suits unnecessarily in such cases.

Lumley Smith, on behalf of the plaintiff in the action in the Exchequer Division, opposed the application. The Court of Chancery would probably think the case fit for a jury, and three of the Chancery Judges had lately decided that they could not try cases with juries under the Supreme Court of Judicature Acts, and that such cases must, therefore, be sent to the Common Law Divisions to be tried. [THE LORD CHIEF JUSTICE. —Probably the Chancery Judges will reconsider their determination when they find that the Judges of the Common Law Divisions will not try such cases. They may, if they please, transfer cases entirely to the Common Law Divisions, but they cannot send them there merely for the purpose of trial. They must try their own cases.] The case might be tried in Chancery by a Vice-Chancellor without a jury; and why should not the action be tried in the Common

Law Division where it was commenced? [The LORD CHIEF JUSTICE.—Because in the Common Law Division the whole matter cannot be disposed of, whereas in the Chancery Division it can. The Common Law Division can only dispose of the action on the bill; the Chancery Division can deal with the whole.] The plaintiffs in the action in the Exchequer Division took the bill before the Chancery action, and without notice, and therefore their claim on the bill was quite distinct from the suit in Equity.

The LORD CHIEF JUSTICE said the power to transfer an action was discretionary, to be exercised on all the facts, to be ascertained by affidavits, and with a view to convenience and expediency. Here the positive affidavit of the plaintiffs in the action on the bill was not contradicted or disproved, and their case was a clear case at Common Law, which could be tried in the action; and there was, therefore, no sufficient reason for transferring it to the Chancery Division.

Mr. Justice QUAIN concurred, saying that on the merits of the case it appeared quite fit to be tried at Common Law.

Mr. Baron POLLOCK concurred.

Application dismissed, with costs.*

* *Times*, Wednesday, April 12th, 1876.

MIDLAND CIRCUIT, WARWICK.

CIVIL COURT.

(Before Mr. Justice FIELD, without a Jury.)

August 3rd, 1876.

BANKART v. HADDON.

Where an action was brought against the surviving partner and the executor of a deceased partner of a firm of builders, and the surviving partner had absconded, the Judge at Nisi Prius transferred the action to the Chancery Division, as being, in substance, an administration suit.

This was an action for money due.

J. C. Lawrence and *Stanes Chamberlayne* were for the plaintiff; *Mellor, Q.C.*, and *Dugdale*, for the defendants.

The plaintiff was the public officer of the Leicestershire Banking Company, and the defendants the surviving partner of a firm of builders, and the executor of the deceased partner. The surviving partner had absconded.

Mr. Justice FIELD ruled that the action as against the executor of the deceased partner was, in substance, an action for administration, which ought to be tried in the Chancery Division. His Lordship considered that, having power to do complete justice in every cause, he ought to give every assistance to the suitors, both as to amending their pleadings and ordering proper transfers.

The following order was made:—"The plaintiff to be at liberty to amend his statement of claim as he might be advised, so as to make a claim on behalf of himself and all other creditors, and to amend the prayer for relief accordingly. The action to be transferred to the Master of the Rolls, subject to the approval of the President of the Division. The costs of the action up to the present time, and those to be occasioned by amendment, to be in the

discretion of the Master of the Rolls, if he pleases to exercise it; if not, to be disposed of by Mr. Justice FIELD, or some other Judge of the Queen's Bench Division.*

SECTION 39.

(Powers of a Judge at Chambers preserved.)

EXCHEQUER DIVISION.

(Before KELLY, C.B. AMPLETT, B., and HUDDLESTON, B.)

February 29th, 1876.

HILLMAN AND ANOTHER v. MAYHEW.

Writ issued in the Exchequer Division.

The statement of claim alleged that the action was brought to recover possession of land and buildings in Norfolk; and that the defendant had improperly, and against the plaintiffs' will, obtained possession. The statement of defence alleged that the plaintiffs had agreed in writing under their hand to grant a lease to the defendant, and that he had entered under that agreement; and, by way of counterclaim, claimed to have the agreement specifically performed, and for this purpose to have the action transferred to the Chancery Division.

Upon a summons at chambers LINDLEY, J., after hearing the parties, made an order, with the consent of the Lord Chancellor as President of the Chancery Division, to transfer the action from the Exchequer Division to the Chancery Division (Master of the Rolls).

Any Judge of the Queen's Bench, Common Pleas, or Exchequer Division of the High Court of Justice, sitting at chambers, has power (with the consent of the Lord Chancellor) to transfer an action from the Queen's Bench, Common Pleas, or Exchequer Division to the Chancery Division, although he is not a Judge of the Division from which the action is transferred.

The correspondence relating to the proposed

* *Times*, Saturday, August 5th, 1876.

lease which had passed between the plaintiff and defendant was produced during the argument and shewn to the Court.

McClymont, for the plaintiffs, moved to rescind the order of LINDLEY, J., and relied upon section 11 of the Supreme Court of Judicature Act, 1873, and Order LI., Rule 2, of the Act of 1875, which confine the right to transfer an action to "any Judge of the Division to which the action is assigned." He cited *Cannot v. Morgan* (Vol. I., Court Cases, 154).

Horton Smith relied upon section 29 of the Supreme Court of Judicature Act, 1873.

Cur. adv. vult.

Feb. 29.—Their Lordships having taken time to consider, the judgment of KELLY, C.B., and AMPHLETT, B., was read by

AMPHLETT, B.—This was a motion to discharge an order, made by Mr. Justice LINDLEY at chambers, for transferring this action from the Exchequer Division to the Chancery Division of the High Court of Justice, and two objections were made to the order; one that Mr. Justice LINDLEY had no jurisdiction, and the other that the facts did not justify the transfer. I will first consider the objection to the jurisdiction. The authority to transfer actions from one Division to another is given by the 36th section of the Supreme Court of Judicature Act, 1873, but subject to the Rules of Court; and by Order LI., Rule 2, which is the Rule applicable to the present case, the order for transfer is to be made "by the Court or any Judge of the Division to which the action is assigned;" and

it is objected that Mr. Justice LINDLEY, not being a Judge of the Exchequer Division, had no jurisdiction to make the order. I am of opinion, however, that there are two sufficient answers to this objection. First, by the 31st section of the Act of 1873, any Judge may sit for any other Judge of a different Division from his own, and by necessary inference from Order LIV., Rule 2, which excepts the transfer of actions from one Division to another from the jurisdiction of the Masters, it appears that orders for transfers may be made by a Judge at chambers, and, in my opinion, such Judge in making the order ought to be considered to be acting therein as a Judge of the Division to which the action belonged. This is conformable to the practice which has existed for many years at chambers, and any change in that respect would be attended with very great inconvenience. But, secondly, I think that the 39th section of the Act of 1873 expressly confers upon the Judge at chambers such a power, for it is thereby enacted that "any Judge of the High Court of Justice may, subject to any Rules of Court, exercise in Court or at chambers all or any part of the jurisdiction by the Act vested in the said High Court, in all such causes and matters, and in all such proceedings in any causes or matters as before the passing of the Act might have been heard at chambers by a single Judge of any of the Courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorised to be so heard by any Rules of Court to be

hereafter made;" and I think that reading that section and Order LI., Rule 2, together, the jurisdiction given by the Order to a single Judge of the Division to which the action is assigned, may be exercised at chambers by any Judge of the High Court who may happen to be sitting there. In my opinion, therefore, the objection to the jurisdiction of Mr. Justice LINDLEY, to order the transfer, fails. Thirdly, as to the propriety of the transfer in this case:— On the facts I think it perfectly clear that the order was right. The claim is simply an ejectment to recover possession of premises, upon which the defendant is alleged to have improperly entered. The counterclaim does not allege any legal title in the defendant, but sets up an agreement for a lease from the plaintiffs to him, and asks for a specific performance. Now, the specific performance of contracts, including contracts for leases, is one of the actions specially assigned to the Chancery Division; and if it had been otherwise, from the machinery at the disposal of that Division, such actions would be more conveniently disposed of there. The plaintiff would, of course, recover in the action of ejectment, as he has legal title. No trial is therefore wanted in that respect. If, after the transfer to the Chancery Division, the defendant makes out his title to a specific performance, the plaintiff will be ordered to grant the lease. If, on the contrary, the defendant fails, he will be ordered to give up possession to the plaintiff with such compensation as the circumstances of the case may require.

A complaint was made that Mr. Justice LINDLEY did not require the defendant to verify the truth of his claim; but the fact was he was never asked to do so, and it was not, as I understand, contended before him that there was no question to try, although a question to try was all that was necessary to authorize and require the transfer. However, that defect, if it was one, was cured before us by the production of the correspondence between the parties and an affidavit of the plaintiff, which established beyond all possible doubt that there is a very serious question to try, and one which would under the old practice have entitled the defendant in a bill for specific performance to an injunction to restrain the action of ejectment.

I have looked at the cases handed us by the plaintiff's Counsel since the argument, but they all go to the merits, with which we have now nothing to do, but which will be determined hereafter at the hearing.

I am authorized to say that the Lord Chief Baron concurs in this judgment so far as it relates to the propriety of the transfer on the facts; but he entertains some doubt on the question of jurisdiction, though not sufficient to induce him to depart from the opinion in that respect of my Brother HUDDLESTON and myself.

HUDDLESTON, B.—I agree that this cause should be transferred to the Chancery Division, because I think we cannot satisfactorily dispose of it here. The question, however, to be considered is whether a Judge of the Common

Pleas Division sitting at chambers has the power to transfer an action in the Exchequer Division to the Chancery Division.

I quite agree with the interpretation put upon the Supreme Court of Judicature Acts by my Brother AMPHLETT, and for the reasons stated by him, which I will not repeat.

But independently of the Supreme Court of Judicature Acts, I am of opinion that, by the joint operation of the Acts of 11 Geo. 4 & 1 Will. 4, c. 70, s. 4, and 1 & 2 Vict. c. 45, s. 1, a Judge at chambers of any Court has power to deal with any matter which by statute is to be dealt with by a Judge of any particular Court. There have been two decisions upon these statutes which I think confirm my view: *Owens v. Woosnam*, L.R., 3 Q. B., 469; and *Palmer v. The Justice Insurance Company*, 6 E. & B., 1015, 1018. It was urged that the provisions of the Supreme Court of Judicature Acts cannot apply to these statutes; but both the statutes I have cited were passed long before the statute 7 & 8 Vict. c. 110, s. 68, and yet they were held to apply in *Palmer v. The Justice Insurance Company*. In the case of *Owens v. Woosnam*, Lord Chief Justice Cockburn said, "As to the jurisdiction of my Brother WILLES to make the order, it is said that section 10 of the 30 & 31 Vict. c. 142 intended to confine the jurisdiction to a Judge of the particular Court in which the action is brought, and though my Brother WILLES was sitting and acting as a Judge of this Court, yet, not being a Judge of this Court, he had no jurisdiction.

I think we must assume the Legislature to have made this enactment with the knowledge of the previous statutes of 11 Geo. 4 & 1 Will. 4, c. 70, and 1 & 2 Vict. c. 45, and it would be extremely inconvenient to put the narrow construction on the section contended for on behalf of the plaintiff. The Judge of any of the Courts when sitting as a Judge of a particular Court is *de facto* a Judge of that Court." And Mr. Justice BLACKBURN said that "by two statutes a Judge of any of the Superior Courts may act as the Judge of either of the other Courts; and the Legislature must be taken to have meant by 'a Judge of the Court in which the action is brought,' a Judge sitting at chambers and acting for that Court." That reasoning is equally applicable to the case now under our consideration.

I think, therefore, that under section 39 of the Supreme Court of Judicature Act, 1873, Mr. Justice LINDLEY had power to make this order, but at all events under the 11 Geo. 4 & 1 Will. 4, c. 70, and 1 & 2 Vict. c. 45, s. 1, he certainly had that power.

Motion refused.*

* L. R., 1 Ex., 132; 45 L. J. (Ex.), 334; W. N., 1876, p. 98; 34 L. T., 256; 24 W. R., 435; 11 N. C., 64; *Times*, Wednesday, March 1st, 1876. See, also, under sections 31, 34, and 36, *supra*.

SECTION 45.

(*Divisional Court of Appeal from Inferior Courts.*)*

QUEEN'S BENCH DIVISION.

(Before BLACKBURN, FIELD, and QUAIN, JJ.)

May 8th, 1876.

Re ELLERSHAW AND OTHERS, JUSTICES OF THE
BOROUGH OF LEEDS.

Ex Parte LONGBOTTOM.

*An application
for a rule
calling upon*

Wills, Q.C., moved for a rule calling upon
the Justices of the Borough of Leeds to state

* The Divisional Court contemplated by section 45 of the Supreme Court of Judicature Act, 1873, for the hearing of appeals from Petty or Quarter Sessions, from a County Court, or from any other Inferior Court, has now been constituted. The Judges are Mr. Justice Field, Mr. Justice Grove, and Mr. Baron Cleasby. By the same section it is enacted that the judgment of the Court shall be final, unless special leave be given to appeal by such Divisional Court.

The order as to the days of sittings of the new Court is as follows :—

“A Divisional Court of the High Court of Justice, constituted under section 45 of the Judicature Act, 1873, will sit to hear and determine any appeals within the meaning of that section on the following days: viz., Thursday, January 27; Friday, January 28; and Saturday, January 29; and on every Thursday, Friday, and Saturday in each succeeding week until further notice.”

The orders as to the preliminaries of hearing, the deposit of documents, &c., are the following :—

“It is ordered that all cases of appeals from Petty or Quarter Sessions, County Courts, or other Inferior Courts, under section 45 of the Supreme Court of Judicature Act, 1873, intended to be heard and determined in any one of the second, third, or fourth Divisions of the High Court of Justice, be lodged and filed in the Crown Office, Queen's Bench Division.

“It is further ordered that in each case three paper books be lodged by the appellant with the Clerks of the Judges, selected under Rule 16 of Rules of December, 1875, at the Judges' Chambers in Rolls Gardens, Chancery Lane, four clear days before the day appointed for the hearing.” (*Law Journal*, Saturday, January 29th, 1876.)

and sign a case for the opinion of the Court, under 20 & 21 Vict. c. 43, and the question arose whether the application was an appeal which ought to be made to the Divisional Court of Appeal from Inferior Courts, and not to this Division.

Justices to show cause why a case should not be stated under 20 & 21 Vict. c. 43, should be made to the Queen's Bench Division and not to the Divisional Court of Appeal from Inferior Courts.

The Court thought that the application was not an appeal within 36 & 37 Vict. c. 36, s. 45, and that it was properly made to this Division of the High Court.

Section 5 of the 20 & 21 Vict. c. 43, directs that the application shall be made to "the Court of Queen's Bench;" and by section 34 of the Supreme Court of Judicature Act, 1873, "there shall be assigned to the Queen's Bench Division all matters which would have been within the exclusive jurisdiction of the Court of Queen's Bench," if that "Act had not passed."*

SECTION 49.

(Orders as to Costs which by law are left to the discretion of the Court, are not appealable without the leave of the Court making them.)

COURT OF APPEAL.

(Before JAMES, MELLISH, and BAGGALLAY, L.JJ.)

March 22nd, 1876.

WITT v. CORCORAN.

This was an appeal from an interlocutory order made by BACON, V.C.

The plaintiff, who was formerly in partnership with the defendant, but who now carried on the business under the style of "Bryan, Corcoran, Witt & Co.," had obtained an order for an in-

An appeal lies without leave from an order of the High Court that the Court being of opinion that defendant has committed a

* L. R., 1 Q. B. Div., 481; W. N., 1876, p. 163.

Breach of an injunction of the Court, and plaintiff by his Counsel not pressing to commit defendant, the Court doth not think fit to make any order except that defendant do pay the costs of this motion, the order for the payment of costs not being made in the exercise of any "discretion."

junction restraining the defendant from holding himself out to the public as carrying on the original business of Corcoran & Co., which he had sold to the plaintiff with the good-will and the right to use the trade name of Corcoran & Co. and the trade marks of the original firm, and from soliciting business from former customers of the firm, or opening letters intended for the firm.

On November 12, 1875, the plaintiff moved to commit the defendant for contempt of Court, for breach of the injunction in having opened a letter from Russia, which contained an order intended for the plaintiff's firm, and also in having issued certain circulars and trade advertisements. The defendant denied that the injunction had been broken.

The plaintiff not pressing for a committal of the defendant, BACON, V.C., made the following order:—"The Court, being of opinion that the defendant has committed a breach of the injunction, and the plaintiff, by his Counsel, not pressing to commit the defendant, this Court doth not think fit to make any order on the motion, except that the defendant do pay the plaintiff's cost of the application."

The defendant appealed from this order, without leave from the Vice-Chancellor.

Kay, Q.C., for the respondents, raised a preliminary objection to the hearing of the appeal, that it was an appeal from an order for the payment of costs, and as such was absolutely prohibited by section 49 of the Supreme Court of Judicature Act, 1873, unless the leave of the

Judge had been previously obtained. The only order was that the defendant should pay the costs of the motion. In *Hope v. Carnegie*, L. R., 4 Ch., 264, Lord Justice GIFFARD said that if there was any case in which an appeal for costs only ought not to be entertained, it was a case of contempt where everything depended on the acts and conduct of the parties. *Taylor v. Dowlen*, L. R., 4 Ch., 697, was also cited.

Sir *H. Jackson*, *Q.C.*, said that the appeal was brought against the decision that a contempt had been committed. The defendant denied that he had been guilty of any breach of the injunction, and on the evidence the Vice-Chancellor had come to a contrary conclusion ; it could not make any difference that no actual order to commit had been made.

JAMES, *L.J.*, said that this clearly was not an appeal for costs only. The order for the payment of costs was not an order made by the Court in the exercise of any discretion. The only principle upon which the defendant could have been made to pay the costs of the motion, was that he had been guilty of some contempt of the order of the Court. If the Vice-Chancellor had not been of opinion that the defendant had been guilty of contempt, he could not have ordered him to pay the costs any more than he could have ordered a defendant to pay the costs when dismissing a bill. It was, therefore, not an appeal for costs within the meaning of the 49th section of the Supreme Court of Judicature Act, 1873, and the objection altogether failed.

MELLISH, L.J., was of the same opinion.

BAGGALLAY, L.J., in concurring, observed that the introductory words in which the Vice-Chancellor had expressed his opinion on the merits of the case, were really a part of the order, and amounted to a decision that the defendant had been guilty of a contempt of Court. The defendant was clearly entitled to appeal from that decision.*

SECTION 50.

(Discharging Orders made at Chambers.)

HIGH COURT OF JUSTICE.—CHANCERY DIVISION.

(Before Sir C. HALL, V.C.)

May 27th, 1876.

MURR v. COOKE.

Leave to appeal from a Judge at chambers direct to the Court of Appeal is not necessary where the question has been fully argued before the Judge at chambers, and the order itself states that it has been so argued.

A summons in the action had been dismissed by Vice-Chancellor HALL at chambers, and it was now desired to appeal from the order direct to the Court of Appeal.

Dauney applied under section 50 of the Supreme Court of Judicature Act, 1873, for leave to appeal from the order without having the summons on which the order was made adjourned into Court.

HALL, V.C., said that no leave was necessary under the circumstances, the case having been fully argued before him. Parties could appeal direct to the Court of Appeal from chambers, provided the matter had been fully argued at

* L. R., 2 Ch. Div., 69; 34 L. T., 550; 24 W. R., 501; W. N., 1876, p. 116; 11 N. C., 77.

chambers before the Judge himself, which fact would be stated in the order. As this had not been done in the present case, it would be certified by the Chief Clerk, on application.*

SECTIONS 56, 57 & 58.

(References.)

CHANCERY DIVISION.

(Before Sir GEORGE JESSEL, M.R.)

February 24th, 1876.

THE BALTIC COMPANY v. SIMPSON.

An interlocutory order had been made in this action, which was a light and air suit, to restrain the defendant, until the hearing or further order, from building so as to obstruct the plaintiffs' light. A number of architects, surveyors, and other witnesses, had made affidavits on both sides, and the cause had been set down for hearing. A motion was now made on the part of a defendant, that a competent and independent architect or surveyor might be appointed to view the premises, and also the plans for the proposed buildings, and to report thereon to the Court as to the extent of injury (if any) likely to accrue to or be sustained by the plaintiffs as regarded the obstruction of light by the erection of the projected buildings.

Ribton, on behalf of one of the defendants, referred to sections 57 and 58 of the Supreme

The power conferred on the Court by sec. 57 of the Judicature Act, 1873, of directing a compulsory reference, does not enable the Court, in an action for obstruction of light and air, to appoint a surveyor at the instance of the defendant to view the premises and plans, and report to the Court as to the extent of the injury, if any, likely to accrue to the plaintiff from the alleged obstruction.

* W. N., 1876, p. 193; 24 W. R., 756; 34 L. T., 751.

Court of Judicature Act, 1873, and to 15 & 16 Vict. c. 80, s. 42; *Kelk v. Pearson*, L. R., 6 Ch., 810; *Cartwright v. Last*, Malins, V.C., February 3, 1876.

JESSEL, M.R.—It is suggested that this motion is justified by section 57 of the Supreme Court of Judicature Act, 1873. I am of opinion, however, that that section is intended for a totally different purpose. The first part of it relates to an order by consent; the part of the section which gives a power without consent only applies to causes or matters “requiring any prolonged examination of documents, or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a Jury or conducted by the Court through its ordinary officers.” That refers, first, to matters which would have to be tried before a Jury, and, secondly, to matters which (in this branch of the Court) would be subjects for investigation by the Chief Clerk at chambers. In such matters, then, “the Court or a Judge may at any time, on such terms as may be thought proper, order any question or issue of fact, or any question of account arising therein, to be tried either before an official referee” or before a special referee, to be agreed on. From this, as well as from section 58, it appears that the decision of the referee is to be equivalent to a verdict. Now, that was not the intention of the motion before me; it is not suggested that the application is for me to refer the question in the cause to the surveyor; and if that is not so,

then the present application does not come within section 57 at all. Then, no doubt, the Court is enabled by 15 & 16 Vict. c. 80, s. 42, to obtain the assistance of scientific persons as witnesses; but that power is exercised when the Judge has heard the cause, and so discovered that he requires scientific assistance. The Supreme Court of Judicature Act, 1873, s. 56, has extended that power, so as to enable the Judge to make use of scientific persons as assessors at the trial; a provision of which the Court of Appeal has taken advantage in obtaining the assistance of the Trinity Masters in a case in which a point of navigation was to be decided. It is plain that neither section 42 of 15 & 16 Vict. c. 80, nor the 57th section of the Supreme Court of Judicature Act, 1873, is applicable here. This notion is altogether misconceived, and I must refuse it with costs.*

CHANCERY DIVISION.

(Before SIR GEO. JESSEL, M.R.)

March 2nd and 14th, 1876.

BRODER *v.* SAILLARD.

This was an action to restrain a nuisance to the plaintiffs' house, alleged to have been occasioned by damp and noise from the adjoining stables belonging to the defendant. When it came on for hearing, an order was made by the Master of the Rolls, with the consent of both parties, for the appointment of a special referee in the following form:

By consent of the parties, a special referee was appointed to inspect plaintiff's and defendant's premises, and report to the Court as to an alleged nuisance, in an action in-

* 24 W. R., 390; 11 N. C., 55.

*stituted for the
purpose of
restraining it.*

"That it be referred to Mr. Edward I'Anson, of Laurence Pountney Lane, in the city of London, as special referee, to survey and to inspect plaintiffs' and defendant's premises respectively, and the premises adjoining thereto respectively, and to report whether or not the plaintiffs' premises are affected by noise arising or coming from defendant's stables, as ordinarily used by the defendant, and if so, then in what manner and to what extent, and how the same is caused or arises; and to report whether or not the plaintiffs' premises are or are likely to be affected by the drainage coming from the defendant's stables as at present used, and if so, to what extent, in what manner, and how the same is caused or arises. In making the above report the quality and nature of the construction, the present state, the position of the plaintiffs' and defendant's premises, and the nature and composition of their foundation, and the ground on which they stand respectively, are to be considered and reported on. Regard is also to be had to the surrounding levels, and adjoining premises. And for the purpose of making his report thereon, the said Edward I'Anson is to be at liberty to direct all such reasonable works and things on the plaintiffs' and defendant's premises to be done as he shall consider necessary; and the said Edward I'Anson is to be at liberty to refer to model, plan, and sections, and to bill and answer, of which copies are to be supplied, it being understood that such reference is to bind neither party by way of admission; and for the purpose of the said

inquiry, the said Edward I'Anson is to be attended by one solicitor and by one surveyor, to be appointed by the plaintiffs and defendant respectively, and the said Edward I'Anson is to attend his Lordship on the sitting of this Court on the 14th of March, and that the cause do stand over until the said 14th of March, and thereupon such order shall be made as to the Judge shall seem meet."

Mar. 14.—The special referee having made his report, he was called upon to answer some questions upon it.

JESSEL, M.R., considered that, Mr. I'Anson being in a *quasi* judicial position, he was not to be sworn.

Roxburgh, Q.C., and *Whithorne*, for the plaintiffs.

Southgate, Q.C., *Philbrick, Q.C.*, and *Romer*, for the defendant.*

COMMON PLEAS DIVISION.

(Before Lord COLERIDGE, C.J., and BRETT and LINDLEY, JJ.)

April 28th, 1876.

CRUIKSHANK *v.* THE FLOATING SWIMMING

BATHS COMPANY, LIMITED.

This action, which was for the balance of a sum alleged to be due on a deed, was begun before the Supreme Court of Judicature Acts came into operation. An order was made after those Acts came into force, allowing a counterclaim

References for decision of the cause under the Common Law Procedure Acts are not abolished. If

* L. R., 2 Ch., 692; W. N., 1876, p. 116; 45 L. J. (Ch.), 414.

a cause commenced before the 1st November, 1875, is referred to a Master after that date, the Master's decision cannot be reviewed by the Court under secs.

56, 57, and 58 of the Judicature Act, 1873, although the order of reference directs that the proceedings shall be contained before the Master "under the new practice."

for damages in respect of a breach of an undertaking to indemnify, to be set up, referring the action to a Master, and directing that the further proceedings should be "continued under the new practice." The Master heard the cause, and made a certificate that £198. 5s. 11d. was due by the defendant company to the plaintiffs.

Holl, now moved, on behalf of the defendants, for an order to set aside the certificate, and calling on the Master to report on the case to the Court for their decision. By the order of reference all the proceedings in this case subsequent to that order were to be under the new practice. The intention of the Supreme Court of Judicature Acts, as shown by the sects. 56 and 57 of the Act of 1873, and by Order XXXVI., Rules 30 to 34, clearly was that all causes referred under those Acts are to be referred for report, and not for decision. Where a cause was referred to a referee under the new practice he was bound to report to the Court, whether it was so stated in the order of reference or not. The object was to remedy the hardship which existed under the old practice of there being no appeal from the decision of an arbitrator. The words of Order XXXVI., Rule 30, showed that it was contemplated that entire causes, and not only questions in causes, should be referred for report.

F. Meadows White, for the plaintiff, opposed the application.—According to the contention on behalf of the defendants all the facts would have to be reported on in every reference. Sects. 56 and 75 of the Supreme Court of Judi-

cature Act, 1873, did not apply to ordinary references such as could have been held before the passing of the Act. The provisions of the Common Law Procedure Act, 1854, as to references (17 & 18 Vict. c. 125, sects. 3 to 17), were not repealed, and the new Acts did not go enough into detail to take their place. The new Acts did not apply there, for the order was to refer the action, and there was no power under the new Acts themselves to refer a cause. A referee under these Acts was entirely different from an arbitrator or a Master to whom a cause was referred; he was more in the position of those persons who could be appointed under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31, s. 3), to hear causes of complaint coming within that section and report to the Court. This was not treated as a reference under the Supreme Court of Judicature Acts, for the provisions of Order XXXVI., Rule 30, as to sitting *de die in diem*, were not observed. The defendants prayed in aid the provisions of the Supreme Court of Judicature Acts to remove a technical difficulty which would have prevented them from availing themselves of their counterclaim; but this could not alter the whole nature of the proceedings.

Holl, in reply.

LORD COLERIDGE, C.J.—This case raises a very important question as to the effect of certain provisions in the Supreme Court of Judicature Acts. Mr. *Holl*'s contention is this:—Inasmuch as the Supreme Court of Judicature Acts contemplate that all references under it

are to be for report, and the order under which this case is referred says that all the subsequent proceedings are to be under the new practice, he has argued that the latter part of the order makes it an order of reference to the Master, not to decide the cause, but for report. It is answered by Mr. White (and I think this is the true answer) that the Supreme Court of Judicature Acts preserve the old procedure, where it is not inconsistent with the provisions of the Acts, that this action was brought under the old practice, and was referred under the old practice, and was to be continued under the new practice, but was referred under the old practice for decision. In my opinion that is the true contention. The action may still be referred for decision to an arbitrator, though the new practice is incorporated into the proceedings. I do not know that it is necessary to go very minutely into the provisions of the Supreme Court of Judicature Acts, for they have only a limited application to this reference. Without wishing to bind myself in any cases which may occur hereafter, and which may be under those Acts, I think that the powers given by those Acts are in addition to, and not in substitution for, the old powers of reference which previously existed. All Divisions may now refer to referees one or more questions arising in a cause, or perhaps even the cause, not for decision, but for report. That is under the Supreme Court of Judicature Acts alone. But under the Common Law Procedure Acts, the reference is of the cause for decision ; and that is the present

case. The application must therefore be refused with costs.

BRETT, J.—It seems to me that the argument of the defendants comes to this, that since the commencement of the Supreme Court of Judicature Acts all decisions of a Master or arbitrator are open to review at the choice of the parties, and that either may insist on a report being made. At the time of the passing of the Supreme Court of Judicature Act, 1873, the Court had power to refer causes for decision, in some cases compulsorily, and had no power to refer a cause, or questions in a cause, for a report on which the Court might give their judgment. That could only be done by getting a special case stated. But in Chancery questions were often referred, for report, to officers of the Court. As, then, one object of the Supreme Court of Judicature Acts was to make the procedure in all Courts the same, there was no necessity to take away the power to refer causes for decision, but to give the Common Law Courts a power which they wanted, of referring matters for report, as in Chancery. These together show us the modes of reference now in force. There being, then, these different kinds of references, which is the reference in the present case? The order is not to report, but to decide the cause, *i.e.*, both the law and the facts, subject to the procedure under the Supreme Court of Judicature Acts, and therefore we have no power to review the award except for a defect on its face or for misconduct of the arbitrator. The application must be refused.

LINDLEY, J.—I am of the same opinion. Looking at the old Common Law Procedure Acts with the Supreme Court of Judicature Acts, there appear to be two kinds of reference, one for decision and one for report. If the case comes under the latter head the report may be reviewed by the Court, but if it be a reference for decision, the decision is final. The only question is, which was intended here? I think the order speaks for itself. The action is referred—i.e., for decision—and the order as to continuing proceedings under the Supreme Court of Judicature Acts only means it to be so as to the setting up of the counterclaim, the evidence, and such matters.

Application refused.*

CHANCERY DIVISION.

(Before SIR CHARLES HALL, V.C.)

June 1st, 1876.

Re LEIGH, DECEASED—ROWCLIFFE V. LEIGH.

In sec. 57 of the Judicature Act, 1873, the words "any question of account" include questions as to the price and warranty or non-warranty of particular articles of vertu and pictures sold to a deceased per-

This was a suit to administer the personal estate of the late Mr. John Gerard Leigh, of Luton, Hoo, the amount of which was sworn under £700,000. Mr. Leigh died on the 24th September, 1875. In answer to an advertisement for creditors, a claim was made upon Mr. Leigh's estate by Mr. Reuben Brooks, of Bond-street, a dealer in works of art, which amounted to £19,193, for various pictures and articles of vertu, supplied to the late Mr. Leigh

* L. R., 1 C. P., 260; 45 L. J., 684; 24 W. R., 644; 34 L. T., 733.

in the months of June, July, and September, 1874. The items, which were twenty-four in number, were specified in an account delivered by Mr. Brooks, the first item being £3,300 for a grand clock and pair of candelabra, *en suite*, in onyx, bronze, marble, &c., and the others comprising other similar articles, and various pictures by Rubens, Gabriel Metzu, Paul Potter, Stanfield, Faed, and other masters. The claimant made an affidavit (not otherwise corroborated) that he was not in the habit of warranting his pictures, but that he believed them to be the work of the masters whose they were represented to be; and he deposed that the prices of the articles had been agreed on between himself and the late Mr. Leigh, who had personally superintended the placing of them in his house.

son, whose estate is being administered in Chancery, and a reference was accordingly ordered of such a "question of account" to one of the Official Referees, one of the parties having declined to assent to a reference to a Special Referee.

The present motion was made in the suit under s. 57 of the Supreme Court of Judicature Act, 1873, and Order XXXVI., Rules 30 and 34, that this claim should be referred for trial to a special referee, who should be agreed upon between the parties; if not, that it should be settled by the Judge himself in Court, and the evidence of experts be taken *vivâ voce*.

Dickinson, Q.C., and *Ingle Joyce*, for the motion, urged that it was of advantage to all parties that this claim, consisting of twenty-four items of account, should be referred, otherwise there would be twenty-four actions to be tried, and the ordinary course of bringing it before the Chief Clerk at chambers, to be certainly followed by adjourned summonses into Court,

would be unsatisfactory, while a special referee would be able to decide the whole question. At all events they were entitled to have it tried before the Judge in Court upon *vivâ voce* evidence.

W. Pearson, Q.C., and *Millar*, opposed the motion, and maintained that section 57 of the Supreme Court of Judicature Act, 1873, did not apply to this matter, which was not a question or issue of fact or a question of account. The matter should go before the Chief Clerk at chambers in the ordinary way. They had no authority to assent to the appointment of a special referee.

HALL, V.C., said that the claim must be referred; the affidavit, as to the price of the articles being fixed, only applied to some of them, and as regarded many of them the Court had only the claimant's own representation in support of that statement. It was manifest that questions would arise in many, or perhaps in all, of those purchases as to the price and warranty or non-warranty of each particular article, and, therefore, a series of trials might be necessary. He was satisfied that the best and most convenient way would be to have the matter referred, instead of having a series of affidavits and then a cross-examination before the Chief Clerk, and then a reference to the Judge to decide whether the Chief Clerk was right. Then the question would be whether he could or ought to direct a reference. It was said that section 57 did not apply; that the present claim did not properly fall within the

word "accounts," used in the section. He, however, so far from narrowing, would give a wide construction to the word "accounts;" and, as he was satisfied from the nature of the case, which was sufficiently indicated by the affidavit of the claimant, that there would probably arise, in connection with the question of warranty, occasions upon which the evidence of skilled persons as to the genuineness of each particular article would have to be received, he was of opinion that this was peculiarly a case falling within that section which provided for cases where scientific investigation was required. A case involving questions of this kind could not be conveniently decided before the Chief Clerk. Then the only remaining question was, whether he should refer it to a special or ordinary referee. It would doubtless be to the interest of both parties to refer the question to a special referee, or to an official referee. Mr. Pearson having no authority to consent to a reference to a special referee, the claim must be referred to one of the official referees, according to *rota*.*

* L. R., 3 Ch., 292; 24 W. R., 782; W. N., 1876, p. 193; *Times*, Friday, June 2nd, 1876.

SECTION 64.*

(*Proceedings to be taken in District Registries.*)

COMMON PLEAS DIVISION.

(Before BRETT, ARCHIBALD and LINDLEY, JJ.)

February 15th, 1876.

OGER v. BRADNUM.

A writ under the Bills of Exchange Act may be issued out of a District Registry, and may require the defendant to apply for leave to appear, and to appear in the District Registry, although neither plaintiff nor defendant resides or carries on business within the District, and it is unnecessary to give the defendant notice that he has the option of appearing in London.

The plaintiff in this case drew upon the defendant on the 13th of November, 1875, at St. Malo (where the plaintiff resided), a bill of exchange for £102. 2s. 2d., payable on the 4th of December, 1875. The defendant accepted the bill of exchange. On the 31st of January, 1876, the defendant was personally served at Newcastle-on-Tyne with a writ of summons, issued out of the Manchester District Registry in the form given in Schedule (A) of the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), with this exception, that the notice indorsed upon the writ was varied as follows:—"Take notice, that if the defendant do not obtain leave from the District Registrar at Manchester within 12 days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do not within such time cause an appearance to be entered for him in the office of the said District Registry, the plaintiff will be at liberty at any time after the expiration of such 12 days to sign final judgment for any sum not exceeding the sum above-claimed, with interest as above specified, and the sum of £4 or such

* See, also, Order II., Rule 6; Order V., Rules 1 and 2; Order XII., Rule 3; Order XXXV., Rules 11 to 13; section 21 of the Supreme Court of Judicature Act, 1875.

further sum as shall on taxation be allowed for costs, and issue execution for the same.

“Leave to appear may be obtained on application at *the office of the Registrar for the Manchester District, 57, King Street, Manchester*, supported by affidavit showing that there is a defence to the action, on the merits, or that it is reasonable that the defendant shall be allowed to appear in the action.”

The defendant did not reside or carry on business within the Manchester District.

There was no statement, it will be seen, on the face of the writ that the defendant might cause an appearance to be entered, at his option, either at the District Registry or the London office, or to that effect.

A summons taken out at chambers, to show cause why this writ should not be set aside because issued out of a District Registry and not indorsed with a notice, pursuant to Order V., Rule 2, that the defendant might cause an appearance to be entered, at his option, either in London or at the District Registry, was referred by DENMAN, J., to the Court. See Vol. I. (Chambers), p. 13.

Gainsford Bruce now moved for the defendant. —The District Registry has no power to issue writs under the Bills of Exchange Act (18 & 19 Vict. c. 67). The Supreme Court of Judicature Acts nowhere give that power to District Registries, but, on the contrary, leave the procedure under that Act unaffected. Sect. 21 of the Supreme Court of Judicature Act, 1875, expressly enacts that all forms and methods of procedure, not inconsistent with the

new Acts and Rules, may continue to be used and practised, and Order II., Rule 6, is as follows:—"With respect to actions upon a bill of exchange or promissory note, commenced within six months after the same shall have become due and payable, the procedure under the Bills of Exchange Act (18 & 19 Vict. c. 67) shall continue to be used." The practice, therefore, as to writs under the Bills of Exchange Act is not touched. If it is, the defendant here neither resides nor carries on business within the Manchester District; the writ, therefore, ought, by Order V., Rule 2, to have given him the option of appearing either in the District or in London; and this is confirmed by Order XII., Rule 3, which is as follows:—"If any defendant neither resides nor carries on business in the District, he may appear either in the District Registry or in London." It cannot be that where the action is on a bill of exchange or promissory note, the defendant is to have no option, but must get leave to appear, and appear in the District Registry; at any rate the Rules make no such distinction between defendants who are sued under the Bills of Exchange Act and other defendants.

Arthur Wilson, for the plaintiff, shewed cause.

By section 64 of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), it is enacted that "subject to the Rules of Court in force for the time being, writs of summonses for the commencement of actions in the High Court of Justice shall be issued by the District Registrars, when thereunto required." Order V., Rule 1, is as follows:—"In

any action other than a Probate action the plaintiff, wherever resident, may issue a writ of summons out of the Registry of any District." All writs, therefore, except in Probate actions, may be issued from the District Registries, and therefore, writs under the Bills of Exchange Act may be so issued. The hardship of having no notice of the option of appearing in London is provided for by Order XXXV., Rules 11 to 13, which allow the Court or a Judge at chambers to make a special order that any proceedings to be taken in an action begun in the District Registry should be taken in London. If the defendant wishes to have this action removed to London, he can avail himself of these Rules; and if he has any reasonable ground for his desire, the action will, no doubt, be removed to London. The real question is, what is the meaning of Order II., Rule 6. It is that the procedure under the Bills of Exchange Act is still to be used, but only so far as it is consistent with the Supreme Court of Judicature Acts.

BRETT, J.—The first question in this case seems to me to be, whether a writ under the Bills of Exchange Act is also a writ under the Supreme Court of Judicature Acts. I think that the Bills of Exchange Act did not make a new writ, but that by that Act, where certain privileges were given to plaintiffs, the writ at Common Law was made subject to certain rules and restrictions, but otherwise was subject to the ordinary rules. In section 64 of the Act of 1873 the words are large enough to comprise a writ under the Bills

of Exchange Act, as also are the words of Order V., Rule 1, of the Act of 1875, and there is much force in the argument that one case is there excepted, and it is not the case of a writ under the Bills of Exchange Act. The only way to construe the Acts is to say that a writ under the Bills of Exchange Act is a writ under the Supreme Court of Judicature Acts, subject, however, to the conditions imposed by the Bills of Exchange Act, and therefore it may be issued out of a District Registry. If this is so, what is to be the form and procedure? As to the form, the writ must contain what is directed by the Bills of Exchange Act, *i.e.*, it must tell the defendant that he must obtain leave to appear. Then comes the question—Where is the defendant to get that leave when the writ is issued out of the District Registry, and the defendant neither resides nor carries on business in the district? If it were an ordinary writ, he might appear in London or in the District Registry. No doubt there is force in what is said, that by such a writ as this you take from the defendant the privilege that other defendants have, and force him to go to the District Registry to get leave to appear. But for the present it must be so, because there is no order yet made to deal with this state of things, and Order XXXV. says that all proceedings up to judgment or entry for trial are to go on in the District Registry. If this writ may be issued out of the District Registry, what happens afterwards is a proceeding before judgment or entry for trial not specially provided for, and it seems to be

within Order V., Rule 1, and that, unless the Court or a Judge otherwise order, the leave to appear must be asked for in the District Registry. But the defendant under such circumstances as these may apply at chambers in London and ask for an order to apply in London for leave to appear. Then the action is to go on under the Supreme Court of Judicature Acts, and though there is no word on the writ as to appearance in London being allowed, yet the defendant would have power to appear in London or in the District Registry. I have interpreted the Acts on the principle that the governing view should be to preserve a symmetry of procedure, where it is possible. The present writ is a good writ.

ARCHIBALD, J.—I am of the same opinion. I think we are bound to read the Acts as far as possible consistently. By the Supreme Court of Judicature Acts all actions are to be commenced by writ of summons (Order II., Rule 1), and the form given in the Appendix is to be followed with such variations as circumstances may require (Order II., Rule 3). Then by Order II. Rule 6, the procedure under the Bills of Exchange Act is preserved. Then we find, from section 64 of the Act of 1873, that, “subject to the Rules of the Court in force for the time being, writs of summons for the commencement of actions in the High Court of Justice shall be issued by the District Registrars when thereunto required.” The plaintiff, in an action on a bill of exchange, to which he wishes to apply the process under the Bills of Exchange Act

may make such alterations as to give effect to that as well as to the Supreme Court of Judicature Acts. Now the process under the Bills of Exchange Act is on the assumption that the defendant is *primâ facie* liable, and in framing a writ care should be taken to carry out all the Acts. I quite agree that a writ under the Bills of Exchange Act is a writ out of the High Court of Justice, and always was one out of the Common Law Courts, and may therefore issue out of a District Registry. Then, as to the notices to be given to the defendant by the writ, I think the statutes authorise the statement that leave is to be obtained from the District Registrar, unless permission to the contrary is obtained in London. And Order XXXV. of the Act of 1875 says that all proceedings down to judgment or entry for trial are to go on in the District Registry. Then it is said that the defendant is not within the District, and therefore ought, by Order V., Rule 2, to be allowed to appear either in the District Registry or in London. But as the notice under the Bills of Exchange Act is to the effect, that he cannot appear at all without leave, it would be idle to add, "If leave is given, you may appear here or in London." I think, therefore, that this writ was correct, and that it carries out the provisions of the Bills of Exchange Act so far as they are applicable under the Supreme Court of Judicature Acts.

LINDLEY, J.—There are two questions before us. First, can a Registry issue writs under the Bills of Exchange Act? Secondly, is this par-

ticular writ in proper form ? As to the first question, I think that upon reading sect. 64 of the Supreme Court of Judicature Act, 1873, together with sect. 21 of the Act of 1875 (which saves, so far as is not inconsistent with the new legislation, all old procedure), and with Order V., Rule 1, it is plain that District Registries can issue writs under the Bills of Exchange Act. It is said that Order II., Rule 6, is inconsistent with that ; but that Rule expresses no more than section 21. Then as to the second question, the form in no way could mislead the defendant, as it tells him that he must get leave to appear, if he would prevent judgment against him, and that the District Registry is the proper place for him to apply to for such leave. As to the difficulty, that there is no notice given to the defendant of an option, the defendant might have made an application in London for leave to appear in London under Order XXXV., Rules 11 to 13.

Judgment for the plaintiff.*

SECTION 76.

*(Acts of Parliament relating to former Courts
to be read as applying to Courts under this Act.)*

CHANCERY DIVISION.

(Before Sir GEORGE JESSEL, M.R.)

June 19th, 1876.

COMMISSIONERS OF SEWERS OF THE CITY OF
LONDON *v.* GELLATLY.

This was an action brought by the Com- *Supplemental*

* L. R., 1 C. P., 334; 45 L. J. (C. P.), 273; 34 L. T., 578; 24 W. R., 404; 11 N. C., 50.

bills (or statements of claim) may still be filed within the period limited by the Epping Forest Acts, 1872 and 1876.

missioners of Sewers on behalf of themselves and all other owners and occupiers of land within the Forest of Essex, other than the waste lands thereof, except such of them as were defendants to the further re-amended bill of complaint in the suit of *The Commissioners of Sewers v. Glasse*, L. R., 19 Eq., 134, or were therein alleged to be sufficiently represented by the defendants thereto or some of them, and except the defendant, to restrain the defendant from interfering with the exercise of the rights of common to which the owners and occupiers of the land within the forest were, by the decree in *The Commissioners of Sewers v. Glasse*, declared to be entitled.

The plaintiffs delivered a statement of claim which they entitled "a supplemental statement of claim," stating the filing of the bill and the decree in *The Commissioners of Sewers v. Glasse*. The plaintiffs claimed that the action might be taken as supplemental to the said suit; that the plaintiffs might have the same benefit of the said decree, and of the inquiry directed thereby, and the same relief against the defendant, as they would have been entitled to if he had been made a defendant to the said suit.

The defendant demurred to the statement of claim.

By the Epping Forest Act, 1872, no new legal proceedings, except such *supplemental* or amended bills as might be filed by the present plaintiffs within a period which, at the date of the action, had not expired, for the purpose of making the suit effectual, should be instituted respecting the

matter in question, except with the leave of the Epping Forest Commissioners.

Chitty, Q.C., and *Vaughan Hawkins*, for the defendant.—Possibly this might be a bill in the nature of a supplemental bill, but it would seem as if supplemental bills were abolished by the Supreme Court of Judicature Acts.

Fry, Q.C. (W. R. Fisher with him), for the plaintiffs.—Although supplemental bills are abolished there may be a supplemental statement of claim. The Supreme Court of Judicature Acts, by abolishing bills, cannot intend to take away from us the power expressly reserved to us by the Epping Forest Act of 1872. We wish to enforce a decree of the Court of Chancery, and section 22 of the Supreme Court of Judicature Act, 1873, provides for this and warrants our action.

JESSEL, M.R.—A fair construction of section 76 of the Supreme Court of Judicature Act, 1873, seems to include such a case as this. For the purpose of a supplemental bill you stand in the same position as before the Supreme Court of Judicature Acts. I am of opinion, however, that this is neither a supplemental nor an amended bill.*

* 24 W. R., 1059. See the new Act, 39 Vict. c. 3, "The Epping Forest Act, 1876," which extends the time till "within one year" from the 17th of March, 1876.

SUPREME COURT OF JUDICATURE ACT, 1875.

SECTION 2.

(*Appeals to the House of Lords, between Nov. 1st,
1875 and Nov. 1st, 1876.*)

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before JAMES, MELLISH, and BAGGALLAY, L.JJ.)

July 22nd & 24th, 1876.

JUSTICE *v.* THE MERSEY STEEL AND IRON
COMPANY.

The practice with regard to appeals to the House of Lords has not been altered by the Judicature Acts or by the Rules of the Supreme Court. The appellant must, therefore, still give bail under the 151st Section of the Common Law Procedure Act, 1852, in the case of

The action in this case had been commenced in October, 1873, in the Court of Common Pleas. At the trial in December, 1873, it was referred to an arbitrator to state a special case. On November 18th, 1875, judgment was given by a Divisional Court of the Common Pleas Division of the High Court in favour of the defendants.

The plaintiffs appealed; and on the 23rd of June, 1876, the Court of Appeal reversed the judgment of the Court below, and ordered judgment to be entered for the plaintiffs for

£4,500, and costs. The plaintiffs on June 30th entered up judgment, and taxed costs on the 4th of July. On the 13th of July the defendants took out a summons at chambers to shew cause why execution should not be stayed pending an appeal to the House of Lords, but the Master refused to make any order thereon. On the 21st of July the plaintiffs delivered a writ of *fi. fa.* to the Sheriff.

appeals from the Court of Appeal to the House of Lords in actions commenced in the Common Law Divisions. The Court of Appeal, having pronounced its judgment, is functus officio. Its judgment becomes that of the High Court, to which, and not to the Court of Appeal, applications for extension of the time for putting in bail should be made.

On the 22nd of July, before the execution of the writ, the defendants moved the Court of Appeal *ex parte*, to stay execution pending the appeal to the House of Lords.

Lanyon, for the defendants, referred to the Supreme Court of Judicature Act, 1875, s. 2, and to Order LVIII., Rule 16, giving the Court power to stay execution pending an appeal.

The Court doubted whether that applied to anything but appeals from the High Court to the Court of Appeal. By the practise existing before the commencement of the Supreme Court of Judicature Acts execution was stayed pending proceedings in error from a decision of the Exchequer Chamber to the House of Lords, by the appellant giving bail in error under section 151 of the Common Law Procedure Act, 1852, whilst in the case of appeals from the Court of Chancery to the House of Lords execution was stayed pending the appeal only by special order of that Court. Their Lordships intimated a doubt as to whether this distinction remained as between the Common Law and the Chancery Divisions, and as to

what was the proper practice at the present time. The fact that bail in error, as it existed between the Court of first instance and the Court of Exchequer Chamber, was abolished under the new practice, was no ground for supposing it to be abolished in the case of appeals to the House of Lords. But the applicant was wrong in making his application *ex parte*. He could take leave to serve the plaintiffs with short notice of motion for July 24.

July 24.—The notice having been given,

Lanyon moved accordingly.—I have ascertained that the practice of giving bail upon appeal to the House of Lords still prevails in the case of appeals from the Common Law Divisions. The Rule under the Supreme Court of Judicature Act, Order LVIII., Rule 1, in abolishing proceedings in error presumably did not refer to error to the House of Lords. [MELLISH, L.J.—Unless you can show that there is some alteration in the practice, this Court can have nothing to do with the matter. The Court of Exchequer Chamber never had any jurisdiction in a matter of this kind. The effect of its decision was to put the matter back into the Court in which it originated to give effect to the judgment, and now the judgment of the Court of Appeal becomes that of the High Court. BAGGALLAY, L.J.—The 21st section of the Supreme Court of Judicature Act, 1875, expressly saves all old procedure which is not inconsistent with the Acts or the Rules of Court.] If we are subject to the old practice we ask the Court to relieve us of the difficulty

in which the uncertainty as to the practice has involved us. The four days, within which, under section 151 of the Common Law Procedure Act, 1852, the bail is to be put in, have expired, and we ask this Court to extend the time for putting in bail.

Bosanquet referred to the terms of sections 151 and 155 of the Common Law Procedure Act, 1852, as showing that the Court of First Instance was the proper tribunal to deal with the application.

MELLISH, L.J.—We have no jurisdiction. There is no alteration of the practice with respect to appeals to the House of Lords. The Court of Appeal having pronounced its judgment is *functus officio*. The judgment has become that of the High Court, and the Division to which the action is attached alone has power to extend the time for putting in bail. The motion must be dismissed, with costs.*

SECTION 4.

(Constitution of the Court of Appeal.)

COURT OF APPEAL.

(Sittings at Westminster on Appeals from the Admiralty Division of the High Court, before JAMES, MELLISH, and BAGGALLAY, L.JJ.)

Feb. 8th, 1876.

THE "DUNKELD."

This was a cause of collision, which turned on a question of navigation.

*When sitting
for the hearing
of Appeals*

* 1 C. P. Div., 575; 24 W. R., 955; W. N., 1876, p. 231. See, further, as to this case, under the Rules of the Supreme Court, Order LVIII., Rule 5.

*from the
Admiralty
Division the
Court of
Appeal has
power to call
in the aid of
Nautical
Assessors.*

Dr. Deane and *Gainsford Bruce* were for the appellants; *Milward, Q.C.*, and *Myburgh*, were for the respondents.

On the opening of the case, it clearly appeared that it turned entirely on a question of navigation, as the defence was that the collision was the fault of the pilot of the "*Dunkeld*."

Lord Justice JAMES observed that it was a question to be determined by the light of nautical skill and experience; and

Lord Justice MELLISH observed that, this being so, it would be fitting that this Court should have the assistance of nautical assessors, as the Court below had, and as the Judicial Committee of the Privy Council had.

Lord Justice BAGGALLAY observed that it was expressly provided by the Supreme Court of Judicature Acts that the Court might have the advantage of such assistance.*

The Court, on looking at the Acts, discovered that, although the Court might call in assessors, no provision was made for the Treasury paying their expenses, as in appeals to the Privy Council. The expense of the assessors would have to be paid by the successful party, who could recover them as part of the costs from the unsuccessful party.

The case was adjourned for the purpose of calling in the assessors.†

* See the Supreme Court of Judicature Act, 1873, s. 56.

† W. N., 1876, p. 66; *Times*, Wednesday, February 9th, 1876.

COURT OF APPEAL.

Sittings on Appeals from the Admiralty Division, before Sir ALEXANDER COCKBURN, C.J., JAMES, MELLISH, and BAGGALLAY, L.JJ., with two Nautical Assessors.)

Feb. 28th, 1876.

THE "DUNKELD."

The Court, as thus constituted, with the assistance of nautical assessors, sat to hear appeals from the Admiralty Division, of which there were two—the "Dunkeld" (appeal of the owners from a decision of Sir ROBERT PHILLIMORE), and the "Queen Anne" (appeal of the owners, also from a decision of Sir ROBERT PHILLIMORE), both cases of collision, and both turning on the facts.

Dr. Deane and *Gainsford Bruce* were for the appellants, and *Milward, Q.C.*, and *Clarkson* for the respondents in the case of the "Dunkeld."*

The COURT reversed the decree of the Judge of the Admiralty Division. No costs on either side.†

* W. N., 1876, 100; *Times*, Tuesday, Feb. 29th, 1876.

† How were the expenses of the nautical assessors to be paid?

COURT OF APPEAL.

(No Judge shall sit on Appeal from any Judgment or Order made by himself.)

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J., and
POLLOCK, B.)

May 8th & 9th, 1876.

RICHARDSON v. THE GREAT EASTERN RAILWAY
COMPANY.*

In order to disqualify a Judge who presided at the trial of an action from sitting on an appeal from the verdict of the jury, it is necessary to show that he expressed an opinion one way or the other at the trial which influenced the jury in their finding.

Watkin Williams, Q.C., for the plaintiff, inquired whether the above case would be taken before the Court as at present constituted, the action having been tried before Lord Chief Baron KELLY, who had directed a verdict to be entered in accordance with the opinion which he entertained, subject to leave to the opposite party to move.

JESSEL, M.R.—The Court has already considered this question, and decided that, where a Judge has merely presided at the trial, the case is not within the letter of the section; and where he has merely directed a verdict for the purpose of raising the point of law, without expressing any opinion one way or the other, he is not within the spirit.

MELLISH, L.J.—If the Judge has decided nothing, and there is no ruling under appeal, the case is not within the section; though, if a Judge has expressed a strong opinion one way or the other, he might think it right not so sit on the appeal.

KELLY, C.B.—If counsel tell me that any

* See the report of the case in the Court below, L.R., 10 C. P., 486.

opinion of mine expressed at the trial will come into question, I should not think it right to sit, as that would undoubtedly be within the spirit of the section.

May 9.—On the case being called on, counsel (*Hawkins, Q.C.*, for the defendants, and *Biron* for the plaintiff) agreed in stating that the Lord Chief Baron had merely left questions of fact for the jury, and had upon their findings directed a verdict for the defendants, with leave to the plaintiff to move. But *Biron* stated that his lordship had expressed an opinion that a portion of the findings was surplusage, and immaterial. The plaintiff's contention on the appeal would be that this part of the findings was most material, and entitled the plaintiff to the verdict.

The Lord Chief Baron accordingly withdrew.*

SECTION 10.

(*Administration of Assets of Insolvent Estates.*)

CHANCERY DIVISION.

(Before BACON, V.C.)

May 18th, 1876.

WILLIAMS v. MATTHEWS; MATTHEWS v.

MATTHEWS.

On the 19th of November, 1875, Benjamin Matthews died insolvent, having by his will given all his real and personal estate to his wife, Harriet, and appointed her his sole

Where a suit was commenced by an equitable mortgagee to establish his charge, and

* 11 N.C., 109. The hearing is reported, 1 C. P. Div., 342, and 24 W. R., 907.

also seeking an administration of the estate in case of deficiency, and a creditor's suit for the administration of the estate was subsequently commenced, and a decree was made in it for the usual accounts and inquiries, the Court, at the instance of the defendant in both suits, stayed all proceedings in the first suit, added an inquiry as to incumbrances to the decree, and, at the instance of the plaintiff in the first suit, gave the conduct of the decree to him.

executrix. The testator at the time of his death was not possessed of any real estate, and his personal estate consisted of a policy of £500 on his own life, and a reversionary interest, worth about £1,500, under his father's will.

On the 5th of April, 1876, Messrs. Willyams and Company, bankers, to whom the testator owed £3,000 at the time of his death, and who claimed to have an equitable charge on the testator's reversionary interest and the policy, commenced the action of *Willyams v. Matthews*, "on behalf of themselves and all the other creditors of the testator," to establish their charge, as equitable mortgagees, and claiming an account and foreclosure, or a sale of the reversionary interest, and application of the proceeds, together with the insurance moneys, in payment of what should be found due to them; and, in case of deficiency, for an administration of the estate and payment to them and the other creditors in a due course of administration.

The defendant, Harriet Matthews, denied the validity of the plaintiff's charge, and required a statement of claim to be delivered.

On the 19th of April, 1876, the suit of *Matthews v. Matthews* was commenced by Mary Matthews, sister of the testator and a creditor for £200, being simply a creditor's summons for the administration of the testator's estate, and on April 28th a decree was made for the usual accounts and inquiries.

Harriet Matthews, the sole defendant in both actions, now moved that all further proceedings in *Willyams v. Matthews* might be

stayed, and that the costs of the plaintiffs therein, up to the time that they had notice of the decree made on the 28th of April, including their costs of the motion, might be taxed; and that such plaintiffs might be at liberty to go in under the decree and prove their claim and the amount of their costs against the assets of the testator.

Sir *H. M. Jackson, Q.C.*, and *Rawlins*, in support of the motion.—The order we ask for is a matter of course. The only question is, who is to have the conduct of the decree? We submit that there is no ground for taking the conduct of the decree from the plaintiff in the second action, which is more for the benefit of all parties interested than the first action, because if *Willyams and Company* succeed in establishing their charge, they will in fact take the whole estate.

Cozens Hardy, for the plaintiff in the second action, supported the motion, and referred to sect. 10 of the Supreme Court of Judicature Act, 1875, and contended that as *Willyams and Company* sought to establish a charge to the detriment of the general body of creditors, their action was in fact a mortgagee's suit, and they could not be said to be suing on behalf of all the creditors.

Kay, Q.C., and *E. S. Ford*, for the plaintiffs in the first action.—The practice is well established that, if there are two suits in progress, and all questions can be decided in one, then the two suits are consolidated, and the conduct of the proceedings is given to the plaintiff in the first suit. *Mason v. Bogg*, 2 M. & C., 443.

Sir *H. M. Jackson, Q.C.*, in reply.—The rule laid down in *Mason v. Bogg* is now no longer the practice to be observed in administering estates in Chancery; estates are now to be administered according to the rule in bankruptcy. Supreme Court of Judicature Act, 1875, s. 10.

BACON, V.C.—It is the well established practice of the Court that two suits for the same purpose will not be allowed to go on together. The plaintiffs in the first action seek to establish a charge and ask that, if there be a deficiency, the estate may be duly administered for the benefit of all the creditors. That is the relief which the statute says they are plainly entitled to, and it is precisely the rule which obtains in bankruptcy.* I am not sorry that the Supreme Court of Judicature Act, 1875, sect. 10, has been referred to, as it affords an opportunity of referring to the new practice. I think, therefore, that if an inquiry as to incumbrances is added to the decree in the terms of the indorsement on the writ of summons of the plaintiffs in the first action, enough will be done to enable them to obtain the relief which they ask for. All further proceedings in the first action must be stayed, but the plaintiffs in that action, as being the persons mainly interested in the administration of the estate, must have the conduct of the decree in the second action.†

* 32 and 33 Vict. c. 71. s. 12; General Rules under that Act, 1870, Rules 78, 79, 80, and 81.

† 45 L. J. (Ch.), 711; 34 L. T., 718.

• SECTION 16.

(The Rules of the Supreme Court regulate all matters to which they extend, from the 1st of Nov., 1875.)

COURT OF APPEAL.

(Before JESSEL, M.R., LORD COLERIDGE, C.J., MELLISH, L.J.,
and DENMAN, J.)

May 18th, 1876.

EARP v. FAULKNER AND ANOTHER.

An action was brought in the Exchequer Division to recover compensation from the defendants for permitting cattle infected with a contagious disease to come into contact with, and thereby infect, the plaintiff's cattle.

The plaintiff, who was a cattle dealer, occupied land adjoining land upon which the defendants, in the autumn of 1874, had hired the right of pasturing cattle. The fences between the plaintiff's and defendants' land being out of repair, cattle strayed from the defendants' on to the plaintiff's land on the 13th and 15th of December, 1874, and were stated by the plaintiff to have infected his cattle.

In January, 1875, the district inspector summoned one of the defendants under the above-mentioned Act, and he was convicted of having on the 18th of December, 1874, kept cattle infected with foot and mouth disease in a field insufficiently fenced.

A rule nisi for a new trial was obtained in Easter Term, 1875, on the ground of improper admission of evidence at the trial. On the argument of the rule nisi, on the 23rd December, 1875, the Court discharged the rule, and the defendants appealed. Held, that the Rules of the Supreme Court (Order XXXIX., Rule 3) applied to the motion for a new trial, although the rule nisi was obtained before they came into operation.

At the trial before QUAIN, J., at the Stafford Spring Assizes, 1875, a verdict was entered for the plaintiff, with leave to the defendants to move for a new trial on the ground that a certificate of conviction of one of the defendants under the Contagious Diseases (Animals) Act, 1869, had been improperly received in evidence. The jury then found that the defendants by themselves, or by their servants, knew of the state of health of the cattle at the time of their being put into the field adjoining the plaintiff's land, and that putting them there was negligence in the defendants.

A rule *nisi* was obtained in Easter Term, 1875. On the 23rd of December, 1875, it came on to be argued, and the Court discharged the rule.

The defendants appealed.

Radcliffe Cook (*H. Matthews, Q.C.*, with him), for the appellants.—There ought to be a new trial on the ground of improper admission of evidence. Order XXXIX., Rule 3, of the Rules of the Supreme Court, giving the Court a discretion, does not apply to a rule *nisi* granted before November, 1875. To make it do so would be giving the Act a retrospective effect, and express words are required for that purpose. It is not a mere question of procedure; to construe the rule as applying to this case would be taking away from us a vested right and giving no right in its place.

Staveley Hill, Q.C., and *J. O. Griffiths, Q.C.*, for the respondent, were not called on.

JESSEL, M.R., said that the Court was asked

to reverse the judgment on the ground that at the trial a conviction of one of the defendants was improperly put in evidence. The defendant was convicted on the 12th of January, 1875, for having done something on the 18th of December, 1874. It was put in to show that the defendant (though he might have done so) did not give evidence that he did not know of the disease on the 18th of December. But by the finding of the jury it became immaterial whether he knew or not on the 18th. It did not influence the verdict of the jury. That being so, the question was, did Order XXXIX., Rule 3, apply? If the trial had commenced after the Supreme Court of Judicature Act, 1875, came into operation, it would apply without doubt. The Rule, in his opinion, left a discretion to the Court, and in all matters of discretion it was necessary to show gross miscarriage to induce the Court of Appeal to interfere. But did the Rule apply where a rule *nisi*, obtained before the Act came into operation, was argued to be made absolute after the Act, was in operation? There was no order for a new trial until the rule was made absolute, and the Rule of Court saying that the Court shall not grant a new trial, they were asked to decide that the Court should grant a new trial. It was argued that vested rights should not be taken away, but the provision was merely remedial. A statute remedying a defect in the procedure applied from the passing of the Act to every question of procedure arising after the passing of the Act.

LORD COLERIDGE, C.J., MELLISH, L.J., and
DENMAN, J., concurred.*

SECTION 18.

*(Rules of the Admiralty Court to continue in
force.)*

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

(Before Sir R. PHILLIMORE.)

January 11th and 12th, 1876.

THE "POLYMEDE."

*Section 18 of
the Judicature
Act, 1875,
enacting that
all Rules and
Orders of
Court of the
Admiralty
Court in force
on the 1st No-
vember, 1875,
except so far as
they are varied
by Rules of the
Supreme Court,
shall remain
in force, and
Rule 10 of
Order XIII.
of the Rules
of the Supreme
Court, by
which the
Rules of Court
of the Admi-
ralty Court as
to proceedings
in default of
appearance in
Admiralty
actions in rem
were varied,*

This was a cause of mortgage instituted on the 3rd of November, 1875, on behalf of the mortgagees of eight sixty-fourth shares in the vessel "Polymede" against the owner of such eight sixty-fourth shares in the said vessel. A writ *in rem* having issued was duly served, and the vessel placed under arrest in the suit, but no appearance was entered on behalf of any person as defendant, and the solicitors for the plaintiffs accordingly, on the 17th of November, 1875, filed in the Registry an affidavit of the service of the writ, and particulars of the plaintiffs' demand, and on the 28th of December, 1875, entered final judgment for the amount of the plaintiffs' claim and their taxed costs, thereby complying with the provisions of Rule 5, Order XIII. of the Rules of the Supreme Court.

The 4th and 5th Rules of the Additional Rules of the Admiralty Court, 1871, which were in force at the commencement of the Supreme Court of

* 34 L. T., 284; 24 W. R., 774.

Judicature Acts, relate to proceedings in causes *in rem* by default, and provide as follows:—

“(4) If, within twelve days after service of a warrant or citation, no appearance shall have been entered in the cause, the proctor for the plaintiff may file his petition, and if, within twelve days from the filing of the petition, no appearance shall have been entered in the cause, the plaintiff’s proctor may, on bringing in his proofs, set the cause down for hearing.

having been annulled by Rule 8 of the Rules of the Supreme Court, December, 1875, the Rules of Court of the Admiralty Court as to proceedings in default of appearance in Admiralty actions in rem are thereby revived, and spring again into force.

“(5) If, when the cause comes before the Judge, he is satisfied that the plaintiff’s claim is well founded, he may pronounce for the claim with or without a reference to the registrar, or to the registrar assisted by merchants, and may, at the same time, order the property to be appraised and sold with or without previous notice, and the proceeds to be paid into Court, or may, make such order in the premises as to him shall seem meet.”

Jan. 11.—*E. C. Clarkson* now moved the Judge in Court to decree the appraisement and sale of eight sixty-fourths of the vessel “Polymede.” Rule 10 of Order XIII. of the Rules of the Supreme Court, having been abrogated,* there is no longer any settled practice with regard to proceedings by default where a writ *in rem* has been issued, and it is doubtful whether in such cases the practice which prevailed in the High Court of Admiralty before the coming into operation of the Supreme Court of Judicature Act, 1875, ought still to be followed, or whether the un-

* By Rule 8 of the Rules of the Supreme Court, December, 1875.

annulled provisions of Order XIII. ought not to be complied with, so far as may be. It is submitted that the solicitors for the plaintiffs have taken the right course in complying with the provisions of Rule 5 of Order XIII.

Cur. adv. vult.

Jan. 12.—Sir ROBERT PHILLIMORE.—This is the first case in which the question has had to be considered by the Court whether the Rules of Court, which form part of the Supreme Court of Judicature Act, 1875, apply to an action *in rem* where the proceedings are by default. What the Court really has to decide is this: Are the Rules of Order XIII. in the Schedule annexed to the Supreme Court of Judicature Act, 1875, applicable to a cause *in rem* in default? or ought the practice prevailing in the Court of Admiralty immediately before the coming into operation of the Supreme Court of Judicature Acts, still to be enforced in such cases?

Now, Order XIII. in the Schedule of the Supreme Court of Judicature Act, 1875, is headed "Default of Appearance," and consists of ten divisions or paragraphs, of which the tenth or last is sub-divided into a great many sections relating exclusively to the proceedings in Admiralty actions *in rem* in which an appearance has not been entered. It is to be presumed, therefore, that the framers of the Rules were of opinion that the first nine paragraphs of this Order were not to be applied to Admiralty proceedings *in rem*. Now, at a meeting of the Judges of the Supreme

Court, held on the 1st of December last, in pursuance of the Supreme Court of Judicature Act, 1875, the 10th Rule of Order XIII. was annulled, and no other Rule was substituted for it. Under these circumstances it has been suggested to me that the 5th Rule of the Order, being sufficient on its face to apply to a judgment by default in an Admiralty action similar to that now before me, has been rightly followed in this case, but I am of opinion that this is a position which cannot be successfully maintained. In the first place, as I have already said, the insertion of the Rule which has now been annulled, shows that the framers of the Rules of Court did not consider that the previous paragraphs of the order were sufficient for the purpose of laying down any Rules with regard to proceedings *in rem*—and, in fact, it was admitted by Mr. Clarkson that neither the 5th Rule, nor any other of the Rules which remain unannulled, could be said to apply to all cases of proceedings *in rem* by default—and, in the second place, the 18th section of the Supreme Court of Judicature Act, 1875, provides that “all Rules and Orders of Court in force at the time of the commencement of this Act in the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Admiralty Court, or in relation to Appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in bankruptcy matters, except so far as they are expressly varied by the First Schedule hereto or by Rules of Court made by Order in Council before the commencement of this Act, shall

remain and be in force in the High Court of Justice and in the Court of Appeal respectively, until they shall be respectively altered or annulled by any Rules of Court made after the commencement of this Act."

In my judgment, the effect of the annulment of the 10th Rule of the Order as to default of appearance (Order XIII.), is to revive the practice previously existing in the High Court of Admiralty with regard to proceedings by default *in rem*, and I must, therefore, pronounce that such practice must be followed in the present case. I shall make no order on the motion, but I shall direct the costs of the motion to be costs in the cause.*

(*Rules of the Probate Court to continue in force.*)

COURT OF APPEAL.

March 7th, 1876.

SUGDEN v. ST. LEONARDS (NO. 1).

A Probate cause, which was pending when the Supreme Court of Judicature Acts came into operation, was heard by a Judge of the Probate Division without a jury under the Court of Probate Act, 1857, Rule 47. The Judge decided

This was an appeal from a decision of the President of the Probate Division, who held that the will and codicils of the late Lord St. Leonards had been duly executed, and that the will, which had been lost, had not been destroyed by him *animo revocandi*, and decreed probate of the contents thereof, as propounded by the executors, and of the codicils.

For the purposes of this report it is necessary to state the following facts:—

On the 15th August, 1875, proceedings were

* 1 P. D., 121; 34 L. T., 367; 24 W. R., 256.

instituted for the purpose of propounding the will and codicils.

On the 29th of April, 1875, Lord St. Leonards, the heir-at-law, and certain interveners pleaded, in effect—(1) that the alleged will was not duly executed; (2) that the said will was revoked by the deceased by destroying it with the intention of revoking it; (3) that the contents of the said will were not as set out in the declaration; (4) that the codicils were not duly executed; and (5) that the codicils were intended to be dependent on the will and to have no force apart therefrom.

On the 9th of June the replication was filed by the plaintiffs, demurring to the last plea, and joining issue on the other pleas.

On the 14th of June the defendants delivered their joinder in demurrer.

On the 22nd of June the following order was made:—"Whereupon the Judge Ordinary did, to wit, on the 22nd of June, 1875, upon the application of the plaintiffs and by consent, order that this cause should be heard before the Court itself without a jury."

On the 25th of November the President of the Probate Division, having stated that he had to discharge the functions of a jury and give his verdict upon certain questions of fact, decided those questions in the plaintiffs' favour, and the following order was made:—"This Court doth find that the Right Honourable Edward Burtenshaw Lord St. Leonards, the deceased in this cause, made and duly executed his last will and testament bearing date on or

the issues of fact raised by the pleadings and pronounced a decree in the plaintiffs' favour. From this decree the defendants appealed, and on the opening of the appeal the plaintiffs submitted that, as the Rules of the Probate Court remained in force under s. 18 of the Judicature Act, 1875, the defendants should have applied under the Court of Probate Act, 1857, Rule 60, for a rehearing, and that, having neglected to do so, the Judge's finding on the facts must be treated as being conclusive as the verdict of a jury. Held, that it was not obligatory for the defendants to have applied for a rehearing, and that they might treat the decree as a final decree in the cause, and appeal from it.

about the 13th January, 1870, and that the contents thereof were in substance or to the effect set forth in the 3rd paragraph of the said declaration as amended, and that the said deceased also made and duly executed eight codicils to the said will, the same being the scripts bearing date respectively March 23rd, 1870; July 4th, 1871; September 16th, 1871; September 20th, 1871; November 24th, 1871; March 27th, 1872; May 1st, 1872; and August 20th, 1873, now remaining in the Probate Registry of this Court annexed to the affidavit as to scripts of the Honourable and Reverend Frank Sugden, the Honourable Charlotte Sugden, and John Reilly, the plaintiffs, the said will and codicils having been propounded in this cause on behalf of the plaintiffs, the executors therein named; and that the said will and codicils were not, nor were either of them, revoked at the death of the said deceased."

On the 7th of December the defendants applied for and obtained an extension of the time in which, under the Probate Act, 1857, Rule 60, applications for a re-hearing must be made.

On the 21st of December, no motion having been made by the defendants for a re-hearing within the extended time, the plaintiffs applied for a decree, and the President, in order to clear the record, overruled their demurrer without argument, and a decree was made in the following terms:—"This Court doth pronounce and declare for the force and validity of the last will and testament of the late Lord St. Leonards, and for the force and validity of

the eight codicils." A *postea* was, under the provisions of the Probate Act, 1857, indorsed on the record stating in effect the finding of the Court.

The defendants appealed from the decree of the President.

Rules 59 and 60, made in pursuance of the Probate Act, 1857, s. 30, are as follows:—

"59. An application for a new trial of an issue tried before a jury may be made to the Court by motion within fourteen days from the day on which the issue was tried, if the Court be then sitting; and, if not, on the first motion day after the expiration of the fourteen days.

"60. An application for a re-hearing of a cause heard before a Judge without a jury, and in which evidence has been given *viva voce*, may be made by motion within fourteen days from the day on which the same was heard, if the Court be then sitting; if not, on the first motion day after the expiration of the fourteen days."

Hawkins, Q.C., and Inderwick, Q.C. (Dr. Tristram with them), for the respondents.—We submit that this appeal must be limited to the question of law arising from the decree and the facts as found by the President must be taken to be conclusive. The proceedings in the Court below were regulated by the Probate Act, 1857, and by the Rules made under that Act, for this was a pending suit at the time when the Supreme Court of Judicature Acts came into operation, and the President made an order under the Supreme Court of Judica-

ture Act, 1873, s. 22, that all pending suits should be proceeded with under the old practice. Moreover the Probate Rules are still in force. Supreme Court of Judicature Act, 1875, section 18. The mode of appeal from the decree is therefore governed by the Probate Rules. The declaration, pleas, and replication were all filed and issue joined on matters of fact in dispute, and that issue delivered in manner directed by the Probate Rules; the President, as required, found on the issues, and his findings were indorsed in the *postea* on the record, and we contend that the decree which was pronounced upon his findings is the same as a judgment of the Court upon the findings of a jury. He found upon the facts, and there has been ample opportunity for the appellants to apply to him for a re-hearing under Rule 60. As they have not made such an application, and as the time for making it is long since past, they are now conclusively bound by the Judge's finding as to the facts. [MELLISH, L. J.—Your argument is that the Court of Appeal cannot re-hear the whole case? JESSEL, M.R.—Why does it not come within the provision of the Supreme Court of Judicature Act, which says that the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court of Justice? Is not this an order of the High Court of Justice?] The Judge's finding upon the issues does not in the least degree operate as an order or as a decree. The appeal must

be against the decree, and if a party wants to have the facts discussed over again he must apply for a re-hearing in the mode prescribed by Rule 60. [JESSEL, M.R.—That Rule, as I understand it, is only potential. It does not say that if a party does not apply for a re-hearing he is finally bound. See the monstrous inconvenience of having the case reheard by the same Judge, and how much better it would be to go to another Judge, or other Judges. Why should you ask us to adopt that which is absurd, when there is a rational proceeding pointed out by the Supreme Court of Judicature Acts? JAMES, L.J.—I am bound to say it does not strike me as being absurd. COCKBURN, C.J.—Nor me. MELLISH, L.J.—The 14th Rule of Order LVIII. of the Rules of the Supreme Court provides that “no interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such a decision upon the appeal as may seem just.”] The mere finding of a fact is not an order or rule. A jury has no power to make an order, and a Judge trying issues of fact has no power to do so until he proceeds to act upon his finding. His mere finding of facts does not amount to an order; it is a mere preliminary step, because before the order can be pronounced the facts must be ascertained, if the facts are at issue. The Rules under the Probate Act require an application for a rehearing of the Judge’s finding of facts to be made within fourteen days from the day

of the hearing, and those Rules have not been abrogated by the Supreme Court of Judicature Acts. No doubt by the 16th section of the Supreme Court of Judicature Act, 1873, the jurisdiction of the Probate Court was transferred to the High Court of Justice; and the 19th section gives the Court of Appeal jurisdiction and power to hear and determine appeals from any judgment or order of the High Court (with certain exceptions mentioned in sect. 49), subject to the Rules of Court. The 22nd section provides that pending suits shall be continued and concluded as the Courts, to which they are attached, respectively, may think fit to direct. The President of the Probate Division thought fit to direct that all pending suits, of which this was one, should be continued under the old practice. [JAMES, L.J.—Is there no authority upon this question? Has there ever been an appeal to the House of Lords from the Probate Court in which the House of Lords entertained jurisdiction to inquire into the finding of either Judge or jury upon a question of fact?] There was the case of *Charter v. Charter* (L. Rep., 7 E. & I., 364), but that was a question of law; the point does not seem ever to have been decided. The 18th section of the Supreme Court of Judicature Act, 1875, provides that all Rules and Orders of Court in force at the time of the commencement of the Act in the Court of Probate, except so far as they are expressly varied by the First Schedule to the Act, or by Rules of Court made by Order in Council before the commence-

ment of the Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively, until they shall respectively be altered or annulled by any Rules of Court made after the commencement of the Act. Order XXXIX., Rule 1, of the Rules of the Supreme Court, provides that a party desirous of obtaining a new trial of any cause tried in the Queen's Bench, Common Pleas, or Exchequer Divisions on which a verdict has been found by a jury or by a Judge without a jury, must apply for the same to a Divisional Court by motion, such motion to be made within four days after the trial. [MELLISH, L.J.—That Rule does not apply to the Probate Division or the Chancery Division.] The Probate Rules are in existence still, and govern this case. The new Rules of Court do not apply to proceedings pending in the Court of Probate before the Supreme Court of Judicature Acts came into operation. [MELLISH, L.J.—We have held more than once that where notice of appeal has not been given before the 1st November, 1875, the suit is not a pending one in the Court of Appeal within the meaning of the Act, on account of the use of the word “respectively” in section 22 of the Act of 1873, and that all proceedings in appeal are to be governed by the new practice, unless some proceedings towards appeal have been taken prior to the commencement of the Supreme Court of Judicature Acts.] There are two cases on which we rely in support of our objection: First, the case of *Tommey v. White* (6 Cl. &

Fin. 786), where it was held that the House of Lords will not give relief to an appellant against an order of which he complains by his petition unless he has taken the proper course to obtain relief in the Court below. Secondly, the case of *Fernie v. Young* (L. Rep., 1 E. & I., 63; 14 L. T., 637), where the House of Lords held that, where a decree in favour of a patent was founded, upon its face, only upon the findings on certain issues which had been tried by a Vice-Chancellor without a jury, no evidence being entered in the decree, and no motion for a new trial having been made, the findings were not open upon the appeal, but the decree itself could alone be looked at. [JAMES, L.J.—There is this difference between the present case and that—though I do not know that it is an essential difference—here the appeal, as I understand it, is against the findings as well.] The appeal is against the decree and order. There is no appeal against the findings. [COCKBURN, C. J.—Supposing this case had been tried by a jury, and the jury had found that Lord St. Leonards purposely destroyed his will, and supposing upon the whole of the evidence the Judge came to the conclusion that that was an erroneous finding, all he could do would be to grant a new trial, but he could not act upon his own judgment as to what ought to have been the finding of the jury upon the evidence, and the result would be exactly the same in a case tried by a Judge without a jury, as is done at the assizes very often; and on an application made to the

Court out of which the record arose for a new trial, upon the ground that the finding of the Judge was against the weight of evidence, all the Court could do would be to send the case down for a new trial; it could not enter up judgment contrary to the finding because in its judgment the finding of the Judge was wrong. MELLISH, L.J.—On the other hand, in the Court of Chancery there was an appeal upon the facts as well as the law, and now the same rules apply in the Chancery, Common Law, and Probate Divisions. If we can accede to Mr. Hawkins' argument, shall we not be holding that we cannot entertain an appeal upon facts decided by a Vice-Chancellor?] Our contention is that this does not come within the Rules of Court under the Supreme Court of Judicature Act. Here the issues were framed and tried under the old Rules of the Probate Court, which Rules are in force till new Rules are made for the regulation of suits in the Probate Court. The 1st section of the Common Law Procedure Act, 1854, shows that the right of appeal against the decision of a Judge on a question of fact is really more limited than that against the verdict of a jury. The appellants, by omitting to apply for a rehearing, have really assented to the correctness of the findings of the Judge, and are not in a position to dispute them now. Rule 60 of the Probate Rules refers only to cases in which evidence has been given *vivâ voce*, and there is a substantial reason why in such cases there should be a rehearing before the Judge who tried the cause, because a good deal

may depend upon the view which he takes of the demeanour of the witnesses. [COCKBURN, C.J.—I have a difficulty in placing a case in which the Judge has decided the facts upon a different footing from a case in which a jury has decided them. JAMES, L.J.—I do not see the meaning of the words “*viva voce*” in Rule 60, except for the purpose of putting a cause tried by a Judge in exactly the same position as if tried by a jury.]

The *Solicitor-General* (Sir Hardinge Giffard, Q.C.), Dr. Deane, Q.C., and Bayford, for the appellants.—The other side proceed upon the assumption that the mode of trial in the Court of Probate was the same as that in the Courts of Common Law, and there is no doubt that as a rule a Judge at Common Law had no jurisdiction to try questions of fact; but in the Court of Chancery it was otherwise, and in the Court of Probate it was otherwise. Under the old practice it was quite competent for the Court of Chancery to send an issue to be tried by a jury, and yet to decide contrary to the finding of the jury. [JAMES, L. J.—We held the contrary the other day, in *Ex parte Morgan; re Simpson*, where we held that the verdict of a jury was conclusive upon the Court, just as it was upon a Court of Common Law, unless the Court was in a position to give a judgment *non obstante veredicto*.] The Court of Appeal in Chancery had the whole case open, although questions of fact were involved, and reversing the decree of the Judge below it often reversed his findings upon the facts. [JAMES,

L.J.—In the Court of Chancery there was no such thing as a finding upon the facts.] Nor is there here any finding of fact in the proper sense of the words. [JAMES, L.J.—We have no such thing as a *postea* in Chancery.] The *postea* here is not analogous to that at Common Law, where the finding on each issue is stated separately; here they are all jumbled together. Where there is an issue, in the proper sense of the word, separated from the hearing of the cause, the proper course may be to apply for a re-hearing; but it is absurd to have the whole cause re-heard by the same Judge, where the facts and the law are mixed up together. As for the case of *Fernie v. Young*, relied upon by the other side, the decision there turned mainly upon the language of the 5th section of the Chancery Amendment Act of 1858, which provides that in trials before a Judge without a jury “the verdict of the Judge shall be of the same effect as the verdict of a jury under this Act,” and as there is no analogous provision in the Probate Act or Rules, that case is no authority for holding that there is no right of appeal from the decision of the Judge of the Probate Court on a question of fact. We base our right of appeal upon Order LVIII., Rule 2, of the Rules of the Supreme Court, and that gives a right of appeal from the whole or any part of any judgment or order. [COCKBURN, C.J.—These proceedings having been taken prior to the commencement of the Supreme Court of Judicature Acts, must not we look to the law which governed proceedings in the Court of Probate

before? And if, according to the old practice of the Court of Probate, it was necessary to appeal within fourteen days, you having failed to do that, your right of appeal is gone unless it is revived by the Supreme Court of Judicature Acts.] That assumes that Rule 60 of Probate Rules applies to appeals, which we contend it does not. It rests entirely upon the proposition that what are called the findings of the Judge, are matters which bound him in his capacity of the President of the Probate Division, and not, as we contend, simply a decree in the cause. If our remedy were by a re-hearing, Rule 60 of the Probate Rules would be applicable; but, as the Legislature has in the meantime given us the right to appeal from the decree of the Judge, that Rule becomes inapplicable. The Rules of the Supreme Court, Order LVIII., Rule 11, clearly contemplates that questions of fact should come before the Court of Appeal.

In answer to a question by the LORD CHIEF JUSTICE,

The SOLICITOR-GENERAL stated that he proposed to have the case re-heard upon the short-hand notes of the evidence taken in the Court below.

After some further discussion,

The LORD CHIEF JUSTICE said that they were all of opinion that it was optional for the parties to apply to the Judge for a re-hearing of the evidence if they should think it desirable to bring it again before his mind, but that they might, if they pleased, treat the order as a final decree and appeal from it.

THE FIRST SCHEDULE.

ORDER I.

RULE 2.

(The Procedure and Practice with respect to Interpleader under the 23 & 24 Vict. c. 126, shall apply.)

SUPREME COURT OF JUDICATURE.

HIGH COURT OF JUSTICE.—EXCHEQUER DIVISION.

(Before BRAMWELL, AMPHLETT, and HUDDLESTON, BB.)

February 3rd and 10th, 1876.

DODDS v. SHEPHERD (LEATHERDALE,
CLAIMANT.)

This was an appeal by the plaintiff's execution creditors from an order made at chambers by Lindley, J., on an interpleader summons, under the summary powers conferred upon a Judge at chambers by s. 14 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), to determine all claims where the amount in dispute is small, from which decision there was not, prior to the Supreme Court of Judicature Acts, 1873 and 1875, any appeal.

No appeal lies from the decision of a Judge at chambers, on an interpleader summons, under the summary powers conferred upon him by s. 14 of the Common Law Procedure Act, 1860, which, by Order I., Rule 2, is incorporated with the new system of procedure and practice; and

Judgment had been obtained by the plaintiffs against the defendant, upon which an execution was issued under which the goods of the defendant were seized by the sheriff of Middlesex on

the Judge at chambers cannot, by reserving leave to appeal from his decision, give the Court above jurisdiction to hear the appeal.

the 11th January, 1876. The goods, which were of the value of £24, were claimed by one Leatherdale as assignee thereof in possession under a deed dated the 3rd of August, 1875, and thereupon an interpleader summons was taken out, which came on to be heard at Judges' chambers before Lindley, J. Counsel, on behalf of the several parties, namely, the claimant, the plaintiffs, the execution creditors, and the sheriff, attended and argued on behalf of their respective clients. For the plaintiffs, it was contended, first, that the deed in question was a bill of sale, and ought to have been registered under the Act, and that not having been so registered, it was invalid and inoperative; and, secondly, that the claimant was not in possession of the goods at the time of the seizure.—For the claimant it was argued that the deed in question was an assignment for the benefit of creditors generally and not a bill of sale, and that it did not, therefore, require to be registered under the Bill of Sale Act. The learned Judge took time to consider the decision in the matter on the 26th January, after stating that he had felt considerable doubt upon the subject, but that the balance of his mind was in favour of the claimant, the assignee under the deed, his lordship made the order now appealed from, to the effect “that the execution creditors” (the plaintiffs) “do withdraw from possession of the goods, &c., seized in the action, and that no action be brought in respect of such seizure; the execution creditor to pay possession money.”

Feb. 3 and 10.—R. V. Williams, for the

plaintiffs, now moved to vary or reverse the order. —The question in the case was purely one of law, depending on the construction of a deed which, on the part of the execution creditors, it is contended, is a bill of sale, and not a deed for the benefit of creditors as the claimant contends it is. [BRAMWELL, B.—Sect. 17 of the Common Law Procedure Act, 1860, is applicable, and the decision of the Judge at chambers is “final and conclusive.” HUDDLESTON, B., referred to and read section 14 also.] That is not disputed, but I contend that the Supreme Court of Judicature Act, 1873, sections 19 and 50, has altered the law. When before Lindley, J., it was assumed by all parties that an appeal would be had. [HUDDLESTON, B.—We are not the Court referred to in section 19 of the Supreme Court of Judicature Act, 1873, and Rule 2 of Order I. of the Act of 1875 shows that the Common Law Procedure Act, 1860, section 17, applies, for it enacts that “with respect to interpleader the procedure and practice under the Interpleader Acts is to apply to all actions and all the Divisions of the High Court of Justice.”] That applies only to the practice and procedure in interpleader cases. The right of appeal is neither one nor the other.

Charles Scott (*Winch* with him), for the claimant, and *Bremner*, for the sheriff, were not heard.

BRAMWELL, B.—I am of opinion that we ought not to hear this application. We have no jurisdiction to do so, and we ought not to allow such jurisdiction to be given to us by the

consent of the parties ; for I think that it is for the benefit of the public generally, and undoubtedly the intention of the Common Law Procedure Act, 1860, that these small matters should be disposed of summarily at chambers without putting the parties to expense, and that the decision should be final. The question is, are we bound to hear it.

Mr. Justice LINDLEY in this case took upon himself to decide the question between these parties summarily under section 14 of the Common Law Procedure Act, 1860 ; and section 17 of that Act enacts that his decision shall be final. Under these circumstances he could not, before the Supreme Court of Judicature Acts, have enabled the parties to appeal against his decision, even though he gave them leave to do so. He might, after hearing the case, have refused to have decided it summarily, or he might have stated a special case, or he might have reserved his judgment and have asked the Court, as it were, to sit with him as assessors ; but he could not have given a power of appeal.

Do the Supreme Court of Judicature Acts, then, enable the Judge at chambers to give the parties power of appeal, and do they give us jurisdiction to hear such appeal ? I do not think they do. It was suggested that the intention of the Legislature, as shown by section 50 of the Supreme Court of Judicature Act, 1873, —“ that every order made by a Judge at chambers may be set aside,”—was to remove the restriction as to appeals of this nature in section

17 of the Common Law Procedure Act, 1860, and that these provisions are by implication repealed as being inconsistent with section 50. But on this point the true rule has been laid down by Mr. Justice Montagu Smith (citing *Lyn v. Wyn*, Bridgman's Judgments, 122, 127), in *The Conservators of the Thames v. Hale*, L.R., 3 C. P., 421:—"The law will not allow the exposition to revoke or alter by construction of general words any particular statute where the words may have their proper operation without it." I read section 50 of the Supreme Court of Judicature Act, 1873, as giving a general power of appeal, but not in any way repealing the special enactment in section 17 of the Common Law Procedure Act, 1860, that no appeal shall lie from an interpleader order made under the summary jurisdiction given by section 14 of that Act. Section 50 is merely for regulating appeals where appeals are intended. But, again, "the appeal," says section 50, "is to be according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned." There is no practice at all applicable to appeals from orders expressly made under the summary power; and by Order I., Rule 2, of the Rules of the Supreme Court, it is enacted that "the procedure and practice under the Interpleader Acts shall apply to all actions and all Divisions of the High Court of Justice." Mr. Williams ingeniously suggested that the right of appeal was neither "procedure" nor "practice," but it seems to me impos-

sible to suppose that that Rule does not incorporate the provisions of the Interpleader Statutes.

AMPHLETT and HUDDLESTON, BB., concurred.
Appeal dismissed.*

ORDER II.

RULE 4.

(Leave necessary before issuing Writ for service, or of which notice is to be given, out of the Jurisdiction.)

CHANCERY DIVISION.

(Before SIR CHARLES HALL, V.C.)

March 8th, 1876.

MEEK v. MICHAELSON.

The leave of the Court is necessary for the issue of a writ, notice of which is intended to be given out of the jurisdiction. Such notice must be given where the defendant is a foreigner resident out of the jurisdiction.

The defendant in this action was a foreigner resident out of the jurisdiction, at Havannah, in the island of Cuba, and the plaintiff had indorsed his writ with a claim to have an account taken of partnership dealings between him and the defendant under an agreement of partnership entered into at Liverpool, and to have the affairs of the partnership wound up. The writ had been issued out of the Liverpool District Registry, and,

Richmond, for the plaintiff, now applied for an order for the substitution of notice of the writ for service of it on the defendant in Cuba.

HALL, V.C.—The leave of this Court must first be obtained for the issue of the writ out of the District Registry, as you propose to give notice of it out of the jurisdiction.

Richmond then applied for such leave also.

HALL, V.C.—My impression is that if I

* 1 Ex. D., 75; 45 L. J. (Ex.), 457; 34 L. T., 358; 4 W. R., 322.

gave leave to issue the writ, the District Registrar might make the order for the substitution of notice for service; but as you combine the two applications I will both give the leave and make the order.*

QUEEN'S BENCH DIVISION.

(Before Sir ALEXANDER COCKBURN, C.J., QUAIN, J., and
POLLOCK, B.)

April 10th, 1876.

SCOTT v. THE ROYAL WAX CANDLE COMPANY.

This was an action against a Dutch company in Amsterdam, having no office or place of business in England, and not registered in England.

The plaintiff obtained leave to issue a writ under the present Rule and Order XI., Rule 1. On the 27th of December, 1875, notice of the writ in the action was served upon the defendants in Amsterdam in Form 3 of Part I. of Appendix (A) of the Schedule to the Supreme Court of Judicature Act, 1875. They did not enter an appearance, and on the expiry of the notice the plaintiff signed interlocutory judgment under Order XIII., Rule 6.

A summons was taken out on behalf of the defendants, before the Master, to set aside the writ and judgment and all other proceedings in the action, on the ground that the Court had no jurisdiction over the defendants; or to set aside the judgment on the ground that it was irregular, the plaintiff not having

A foreign corporation may be served with notice of a writ of summons out of the jurisdiction. No order for leave to proceed is necessary before signing interlocutory judgment under Order XIII., Rule 6, in default of appearance, notwithstanding the words "by leave of the Court or a Judge," in Forms 2 and 3 of Part I. of App. (A).†

* W. N., 1876, p. 111.

† The words "by leave of the Court or a Judge" have now been omitted from Forms 2 and 3 of Part I. of Appendix A (Rules of the Supreme Court, June, 1876).

obtained an order to proceed ; or to set aside the judgment as having been signed by surprise, and owing to a mistake on the part of the defendants in the practice of the Court.

The summons was referred by the Master, who entertained some doubt about the proper practice, to Quain, J., who, on the 2nd of March, referred it to the Court.

April 10. *R. E. Webster*, for the defendants, now moved to set aside the writ and judgment. The question is, first, whether a foreign corporation who have no office in England can be served with process under Order XI., Rule 1. *Ingate v. Austrian Lloyd's*, 4 C.B. (N. S.), 704, decided that it could not, under s. 19 of the Common Law Procedure Act, 1852. The form of notice in Appendix (A), Part I, Form 3, of the Act of 1875, does not apply to a foreign corporation. The legislation of the Act is exactly the same as that of the Common Law Procedure Act, 1852, ss. 18, 19. In the Chancery practice it is clear there was no such service. The existing practice is expressly reserved by s. 21 of the Act of 1875, and the note at the head of the Schedule, where there is no enactment to the contrary. *Drummond v. Drummond*, L. R., 2 Ch., 32, was against a private person. Order XI. does not apply to cases where personal service cannot be effected. Secondly, no order for leave to proceed was obtained by the plaintiff pursuant to his own notice. The plaintiff must satisfy a Judge at chambers that he has a good cause of action, and then serve his order to proceed upon the defendant, who until then need take no

notice of the proceedings. Thirdly, even if the two previous points are decided in the plaintiff's favour, the defendants ought to be let in to defend; they have been misled by the form of the notice and they have a good defence on the merits.

Finlay, for the plaintiff.—As to the first point there is no reason why a foreign corporation should not be a defendant; it has always been able to be a plaintiff. [COCKBURN, C.J.—Because, of course, it can follow an English subject, defendant, in the English Courts.] In *Newby v. Von Oppen*, L. R., 7 Q. B., 293, this Court decided that a foreign corporation could be sued in this Court, if it has a place of business in this country. As to the decisions under the Common Law Procedure Act, 1852, section 18 is wholly inapplicable to a corporation; and section 19, which gives a method of proceeding against foreigners, clearly points to individuals. There is no express provision in the present order for serving a foreign corporation; it is left to the discretion of the Court. *Lewis v. Baldwin*, 11 Beav., 153, shews that service upon an Irish corporation, having no office in this country, may be good, by direction of the Court of Chancery. In Chancery the Court could order service of process: Dan. Ch. Prac., 2nd ed., p. 419; *Drummond v. Drummond*, L. R., 2 Ch., 32; and these Rules are intended to provide procedure for all the Divisions of the High Court of Justice, and do not take away any power possessed by any one of them before. In *Sheehy v. The Professional Life Assurance Company*, 3 C. B. (N. S.), 597, a judgment obtained

in Ireland against a corporation in London was enforced in England. In *Westman v. The Aktiebolagst Ekmans Mekaniska Snickerifabrik*, 1 Ex. D., 237, the Exchequer Division held that notice of the writ, and not the writ itself, must be served on a non-resident foreign corporation ; but that there is nothing to prevent the issue of a writ against it. As to the second point, no order to proceed was necessary ; leave is now obtained before the writ is issued at all : Order II., Rule 4. Formerly, too, it was only in a limited class of cases that you might proceed against a person out of the jurisdiction. The words in the present form, “ may by leave of the Court or a Judge proceed,” are copied from Form 3, of Schedule (A), to the Common Law Procedure Act, 1852, by inadvertence. Order LXIII. defines “ person ” as including “ corporation.”

Webster, in reply.

COCKBURN, C.J.—Prior to the passing of the Supreme Court of Judicature Acts a Common Law Court could not, I think, have sanctioned these proceedings. The terms of the 19th section of the Common Law Procedure Act, 1852, are not applicable to corporations not regulated by English law. With regard to the alleged practice of the Court of Chancery as to ordering its process to be served on foreign corporations out of the jurisdiction, I would only say that is a matter upon which I do not take upon myself to express any opinion. Order XI., by a short cut, has put an end to all questions of that kind. It has given to all

portions of the High Court the power to order service upon as many defendants as is desired, whether sued in their own persons or as a corporation, in the cases mentioned in that Rule. The language of Rule 1 of Order XI. is quite large enough to include a foreign corporation as well as a foreign subject resident abroad. The words differ widely from those in the 18th and 19th sections of the Common Law Procedure Act, 1852, the difficulty arising under which is here entirely done away with. Whatever the Rule comprises in its terms must be considered within its operation. I think, therefore, that upon the construction of Order XI. this service might be made.

With regard to the other question, whether it is necessary for the plaintiff to obtain leave to proceed after having obtained leave to issue the writ, I think the plaintiff was in order in signing judgment without leave to proceed; but I also think that this form of notice was calculated to mislead, and that, therefore, having regard to the position of the defendants, the judgment ought to be set aside and the defendants be left in to defend upon paying the costs.

QUAIN, J.—I am of the same opinion. I think it is plain, when you come to look at Order XI., that this service was good. Order XI., Rule 1, which was intended to apply generally in future to all the Divisions of the High Court, expressly provides for service out of the jurisdiction of a writ, or notice of a writ, in certain cases, and specifies the particular classes of cases. I do not see that there is any difference

made in the Rule between service upon an individual foreigner and a foreign corporation ; one is a natural person, the other is an artificial person. Whether the defendant is a corporation or not, he is equally subject to be sued. When you come to the practice at the time this Order was made, it shows strongly that the intention of the framers of the Order was to alter that practice.

The decision in *Ingate v. Austrian Lloyd's*, 4 C. B. (N. S.), 704, that s. 19 of the Common Law Procedure Act, 1852, does not apply to a foreign corporation, I should like, if necessary, to have reconsidered. *Lewis v. Baldwin*, 11 Beav., 153, I regard as some authority for the statement that the distinction between service on a foreign subject and a foreign corporation was unknown to the Court of Chancery.

POLLOCK, B.—I am of the same opinion. The language of Order XI., Rule 1, is large enough to include foreign corporations. The language of s. 19 of the Common Law Procedure Act, 1852, was much more restricted.

Motion granted, subject to payment of the costs by the defendants.*

CHANCERY DIVISION.

(Before Sir CHARLES HALL, V.C.)

May 3rd, 1876.

BACON v. TURNER.

*Leave given by
Court to serve
on a foreigner*

This was an action for the administration of certain trusts of a will, and the plaintiff wished

* 1 Q. B. D., 404 ; 45 L. J. (Q. B.), 586 ; 34 L. T., 683
24 W. R., 668 ; W. N., 1876, p. 20.

to serve notice of the writ of summons upon a German subject, who was residing at Wiesbaden, in Nassau, and on his wife, an Englishwoman residing at the same place.

Oswald, in moving *ex parte* for leave to issue and serve notice of the writ on these defendants, called attention to the recent decision of the Queen's Bench Division, in *Scott v. The Royal Wax Candle Company*,* in which Lord Chief Justice Cockburn expressed his opinion that the notice ought to have been amended, as misleading. Having regard to this case the plaintiff also asked for leave to amend the notice of writ by striking out the words "by leave of the Court or a Judge."

HALL, V.C.—I shall follow *Scott v. The Royal Wax Candle Company*. You may issue and serve notice of the writ, amended by omitting the words, "by leave of the Court or a Judge." The female defendant cannot be considered a foreigner, and must be served with the writ.†

EXCHEQUER DIVISION.

(Before BRAMWELL and AMPHLETT, BB.)

PRESTON *v.* LAMONT.

June 26th, 1876.

This was an application on the part of the plaintiffs, who had brought an action against the defendants to recover the price of goods sold and delivered, to strike out the statement of defence filed by the defendants, as wholly bad.

* *Ante*, p. 179.

† 1 Ch. Div., 275; 34 L. T., 349; 24 W. R., 637.

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one absolutely within the discretion of the Court or Judge applied to for leave under Order II., Rule 4, subject only to appeal. An attempt having been made to raise this question in the statement of defence, the statement of defence was struck out as bad.

The action was for the price of goods sold and delivered.

The statement of defence was to the following effect : That the action was commenced on the 18th January, 1876, by a writ in the form given in the Rules of Court, 1875, Appendix (A), Part 1, Form 2, under colour of Order II., Rules 4 and 5, and was served on the defendants at Glasgow, in Scotland ; that the action was brought for the breach of a contract made at Glasgow, and out of the jurisdiction of this Court ; that there never was any breach of it within the jurisdiction, and that none of the circumstances mentioned in Order XI., Rule 1, existed ; that the defendants were born in Scotland, Scottish subjects of the Queen, and of parents who were also such subjects, and were long before, and at the time of and ever since the issuing of the writ, resident and domiciled in Scotland alone, and had not been during the same period, resident or domiciled in England, or within the jurisdiction, and were entitled to all the privileges and immunities secured to the Scottish subjects of the Queen ; that, even if any of the circumstances mentioned in Order XI., Rule 1, existed, the subject-matter of the action was alleged debts or breaches of contract by non-payment of money, over which, when the Judicature Act, 1873, was passed, no Court of Equity had jurisdiction, but which were wholly within the exclusive jurisdiction of the Courts of Common Law ; that no Court, the jurisdiction whereof is transferred to or vested in this or any Court by the Judicature Acts,

1873 or 1875, nor any other Court, save Courts established in Scotland, had, up to the passing of the Judicature Act, 1873, any jurisdiction or cognizance over such subject-matters as those in this action exercisable by process in Scotland, or having any validity in Scotland, or as regards persons living in Scotland; that no jurisdiction capable of being so exercised was transferred to or vested in this Court by section 22 of the Judicature Act, 1873; that several of the Scotch Courts, and particularly the Court of Session at Edinburgh, have complete jurisdiction over all the subject-matters of this action, and the defendant, and can do complete justice therein.

The plaintiff lived in Kent and the defendant in Glasgow; the goods, the subject of this action, were ordered by the defendant in Glasgow of the plaintiff's agent in that place, who, as was usual, transmitted the order by post to the plaintiff, who then sent the goods by carrier to the defendant at Glasgow. The invoice sent with the goods was headed:—"Payment to be made direct to J. Stone and Co., London."—"J. Stone and Co.," being the name under which the plaintiff traded.)

The plaintiff had on January 18th, 1876, obtained leave from a Judge under Order II., Rule 4, to issue a writ out of the jurisdiction pursuant to the provisions of Order XI., Rule 1, and this writ was served on the defendant in Glasgow. The defendant appeared and requested a statement of claim; he also on several occasions obtained time to plead. On May

15th, 1876, he took out a summons to set aside the service of the writ and all subsequent proceedings, on the ground that the English Courts had no jurisdiction and that no part of the cause of action arose in England ; but the Judge refused to make the order, on the ground that the application was too late, and this decision was, on appeal, affirmed by the Exchequer Division.

Dodd, for the plaintiff, now moved to strike out the statement of defence.—The statement of defence is bad, it amounts to a plea in abatement, and this is forbidden by Order XIX., Rule 13. The question has been decided by the Judge at chambers on evidence there produced, and cannot be raised by plea. Even if there had been an irregularity in the service, still the defendant, having appeared and asked for a statement of claim, has waived it: *Ex parte Robertson*, L. R., 20 Eq., 733. But even if it were not so, the issuing of the writ is conclusive as to the jurisdiction. *Drummond v. Drummond*, L. R., 2 Ch., 32.

Crompton, for the defendant. This is a plea to the jurisdiction. The question of jurisdiction is one of fact, to be tried by a jury, and not by a Judge in a summary way at chambers. If there was an action about land near the border, then the defendant would have a right to a trial by jury as to whether the land were in England or Scotland. So here the defendant is entitled to prove facts which will show that there was no contract in England.

BRAMWELL, B.—This statement of defence is, without doubt, bad, and I think that it

ought not to be allowed to stand, for it is, in reality, not a plea to the jurisdiction, but to the propriety of the service of the writ. Certainly if a statement of defence be plausibly good, we ought not to strike it out; but here we have to deal with one that is clearly bad. This statement does not amount to a plea that, if the defendant had been found within the jurisdiction of this Court, the action could not have been maintained. The effect of the Rules relating to this question is, that the plaintiff must get the leave of a Judge before he can serve the writ; the Judge must be guided by the principles laid down in Order XI., Rule 1, and must be satisfied by the evidence adduced pursuant to Rule 3 of that Order. The defendant is then entitled to apply to set aside the service of the writ on the ground of mistake, or on some other sufficient ground; but if the Judge declines to set it aside, then I think that there is no way of raising the point by plea or statement of defence. The question whether the action is within Order XI., Rule 1, is a question for the Judge on the affidavit of the plaintiff, supplemented, it may be, by other evidence, and subject to an appeal to the Divisional Court; and I am of opinion that there is no other way in which the question can be raised. Of course the defendant may, in his defence, allege that he never made the contract, or never broke it, but he is not at liberty to say what the defendant has said here. I am of opinion, therefore, that the plaintiff's application to set aside this statement of defence must be granted.

AMPHLETT, B.—I am of the same opinion.

It is quite clear that this is not a plea to the jurisdiction, but to the manner of the service of the writ. The Court, or the Judge at chambers, has a discretionary power, and ought not to make any order at all for the service of a writ out of the jurisdiction, unless, upon being satisfied that the cause of action arose in this country, and that it comes within the instances given in Order XI., Rule 1, they decide that the writ may, with propriety, be so served. The decision may then be questioned on appeal to the Court of Appeal, and, if needful, even to the House of Lords. This mode of proceeding is, it seems to me, both convenient and useful, as it enables the question of jurisdiction to be raised and settled in a cheap and speedy manner, before expense is incurred in relation to the defence of the action on the merits; whereas, if the question could be raised by plea, and it should in the end be determined that the case is not one within Order XI., Rule 1, then all the expenses of pleading and defending the action would be utterly wasted and thrown away. In my judgment, both convenience and justice concur in requiring that such a question should not be allowed to be the subject of a plea, or of a statement of defence. This statement of defence, therefore, must not be allowed to stand, and the plaintiff's application to strike it out must be granted.

Application granted.*

* 1 Ex. Div., 361; 24 W. R., 928; 35 L. T., 341.

RULE 5.

(*Form of Writ of Summons.*)

See the case of SCOTT *v.* THE ROYAL WAX CANDLE COMPANY, and BACON *v.* TURNER, reported under Rule 4 of this Order.

RULE 6.

(*Application of the Procedure under the Bills of Exchange Act, 1855; 18 & 19 Vict. c. 67.*)

EXCHEQUER DIVISION.

(Before KELLY, C.B., and CLEASBY and HUDDLESTON, BB.)

POLLOCK *v.* CAMPBELL BROTHERS.

January 13th, 1876.

This was an action upon a bill of exchange, brought within six months of the maturity of the bill, the writ being indorsed under the Bills of Exchange Act, 1855. The defendants carried on business in partnership at 39, Lombard Street, City, and, as appeared by an affidavit, deposed to by a clerk to the plaintiff's solicitors, the writ was served by the clerk at the defendants' premises in Lombard Street upon a person having the control and management of the partnership business there, and who informed the clerk who served the writ that he was a partner, but declined to say whether he was, or was not, the sole partner in the firm, or to give his name; nor did the defendants know either of those facts.

The defendants did not appear to the writ,

In an action under the Bills of Exchange Act, 1855, before a plaintiff can sign judgment in default of appearance he must strictly follow the procedure prescribed by sect. 1 of the Bills of Exchange Act, and file an affidavit of "personal service," or obtain an order for leave to proceed under the Common Law Procedure Act, 1852; and service on a partnership

under Order IX., Rule 6, or an order for "substituted service" under Order IX., Rule 2, will not be allowed.

and the plaintiffs filed an affidavit of service, as above, and applied at the office to sign final judgment, under section 1 of the Bills of Exchange Act. The officer refused to allow it to be signed, on the ground that the name of the party served with the writ was not stated in the affidavit. Therefore an application was made at chambers for an order to enter judgment, on the ground that Order IX., Rule 6, had been complied with; but the Master refused to make an order. The plaintiffs then took out a summons for an order for "substituted service," under Order IX., Rule 2, which also was refused by the Master, on the ground that that Rule was not applicable to the case of proceedings under the Bills of Exchange Act. On appeal from both decisions to Denman, J., at chambers, the learned Judge referred the matter to the Court; and now

R. Henn Collins, for the plaintiffs, moved for leave to sign judgment accordingly, and stated that the defendants were sued in the name of the firm, under Order XVI., Rule 10, which provides that "any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any;" and the writ was indorsed under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 17). Service of the writ was effected under Order IX., Rule 6, which provides that "Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of

the partnership, upon any person having, at the time of service the principal business there; and, subject to the rules" thereafter "contained, such services shall be deemed good service upon the firm." This service the plaintiffs have effected, and it is "personal service" within the meaning of s. 1 of the Summary Procedure on Bills of Exchange Act, 1855. Neither that enactment nor the Orders under the Supreme Court of Judicature Acts require that the name of the person served should be known. Order II., Rule 6, no doubt says that "the procedure under the Bills of Exchange Act shall continue to be used;" and the Master seems to have thought that under that Rule service on each individual defendant was still requisite. But the meaning of that Rule is that "the procedure under the Bills of Exchange Act shall continue to be used, where not inconsistent with any of the other Rules of the Supreme Court." Order II., Rule 6, must be construed with Order IX., Rule 6. It could not have been intended that plaintiffs in actions on bills of exchange should be deprived of the advantages which plaintiffs in other actions have, as to suing firms, and which the plaintiffs in this action would have had, if they had indorsed their writ under Order III., Rule 6, if the defendant had either not appeared, or had appeared and had not obtained leave to defend under Order XIV., Rule 1. If, however, the Court thought that "personal service" on each defendant was necessary, he would ask for an order for substituted or other service,

under Order IX., Rule 2, the plaintiffs being "unable to effect prompt personal service" within the meaning of that Rule. [CLEASBY, B.—If Order IX., Rule 6, cannot be read with Order II., Rule 6, neither can Order IX., Rule 2.]

KELLY, C.B.—I was for some time under the impression that we ought to accede to this application, as Order IX., Rule 6, is one of the most salutary provisions of the new Act.

I should be disposed to hold that, where the clerk to the plaintiff's solicitors has served a writ, in which the defendants are sued, in the name of their firm, at the place of business of that firm, on a person who had the control and management of the business, and who told the clerk that he was a partner, but refused to give his name, that that would be a good service. But when we consider that this action is brought under the Bills of Exchange Act, 1855 (18 & 19 Vict., c. 67), and we refer to Order II., Rule 6, we find that, "with respect to actions upon a bill of exchange or promissory note, commenced within six months after the same shall have become due and payable, the procedure under the Bills of Exchange Act (18 and 19 Vict., c. 67) shall continue to be used."

It is admitted that this is an action under that Act, and the only question, therefore, is whether the application made here to sign final judgment against the firm of partners is a part of the procedure under that Act. Section 1 of that Act provides that where the writ is

indorsed under that Act the plaintiff, on filing "an affidavit of personal service of such writ within the jurisdiction of the Court," and complying with certain other specified requirements, "may, if the defendant has not obtained leave to appear, and has not appeared, sign final judgment at once." Now, the signing final judgment is as much a part of "the procedure under the Bills of Exchange Act," as issuing and indorsing the writ itself. The plaintiffs, therefore, must under that Act prove "personal service of the writ," which they have not done, and therefore their application must be refused.

CLEASBY, B.—I am of the same opinion. We must, if we can do so, give effect to Order II., Rule 6, as well as to Order IX., Rule 6. If we could not give effect to the latter Rule without applying it to the former one, we should be bound so to apply it. But there is, I think, little or no difficulty in giving effect to both of them, and there is no inconsistency between them. The effect of Order II., Rule 6, is to cause the procedure under the Bills of Exchange Act to continue in all actions brought under that Act; and there is a reason for it, since under that procedure a plaintiff can sign final judgment and seize the goods of the defendant unless the defendant obtains leave to appear. The practice, therefore, under that procedure, should be very strictly observed. Order IX., Rule 6, applies generally to the case of partners sued in the name of their firm,

and we can give substantial effect to it, without applying it to cases coming within Order II., Rule 6. And, moreover, the plaintiffs could have proceeded under the Rules,* which enable plaintiffs seeking to recover a liquidated money demand to specially indorse the writ and sign final judgment if the defendants do not appear; but an application to sign judgment under these provisions would require a strict affidavit of service.

HUDDLESTON, B.—I am of the same opinion. This is a procedure under s. 1 of the Bills of Exchange Act, 1855, by which “personal service” of the writ on the defendant, or an order for leave to proceed under the Common Law Procedure Act, 1852, is necessary. That the Legislature did not mean the new procedure under the Supreme Court of Judicature Acts to apply to actions under the Bills of Exchange Act is clear from the terms of Order II., Rule 6. The Bills of Exchange Act contains no provisions for serving one only of several defendants, as has been done here; and for an order to proceed under the Common Law Procedure Act, 1852, an application upon proper materials should be made at chambers. Personal service on each of the defendants is necessary in this case, and that has not been effected. Therefore, the plaintiffs are not entitled to sign judgment and their motion must be refused.

Motion refused.†

* Order III., Rule 6; Order XIII., Rules 2, 3.

† 1 Ex. D., 60; 45 L. J. (Ex.), 199; 34 L. T., 360; 24 W.R., 320.

ORDER III.

RULE 2.

(*Amendment of Indorsement of Claim on Writ of Summons.*)

CHANCERY DIVISION.

(Before Sir GEORGE JESSEL, M.R.)

June 30th, 1876.

MATHIAS v. MATHIAS.

In this case leave having been given by the Court to amend the writ, the Clerk of Records and Writs had been applied to for the purpose of making the amendment upon production of Counsel's brief with the order indorsed thereon and initialed by the Registrar, but he refused to amend till the order had been drawn up.

Leave given to amend the writ, upon production of the brief indorsed by Counsel and initialed by the Registrar.

Snape now mentioned the matter to the Court.

The MASTER OF THE ROLLS directed that the writ be amended upon production of the brief in the case indorsed by Counsel and marked by the Registrar with his initials.*

CHANCERY DIVISION.

(Before Sir CHARLES HALL, V.C.)

January 15th, 1876.

COLEBOURNE v. COLEBOURNE.

In this case a brother and sister were entitled to personal estate in moieties; the brother, who was also sole executor, had advertised a large part of the assets for sale, and had, it was

A lady who had commenced an administration action against her brother, who

* W. N., 1876, p. 214.

was joint-legatee and sole executor and had advertised the property for sale and intended (as alleged) to leave the country, was allowed to amend the indorsement on her writ (which was for administration only) so as to extend it to claims (1) for an injunction, and (2) for a receiver.

alleged, expressed an intention shortly to leave the country. Under these circumstances the sister commenced an action for administration, and had endorsed her writ with a claim for administration only.

Oswald, for the plaintiff, now moved *ex parte* before service, upon the authority of *H. v. H.** for the appointment of a receiver by name. He submitted that the Court had full jurisdiction to make the order under the Supreme Court of Judicature Act, 1873, s. 25, subs. (8), although the writ had not been indorsed with a claim for an injunction or receiver. But if the Court thought otherwise, he asked leave, under Order III., Rule 2, to amend the indorsement. It was at least doubtful whether the special indorsement was requisite. He referred to Wilson's "Judicature Acts," pp. 64, 158, 159, 165.

THE VICE-CHANCELLOR said that the plaintiff had better amend her indorsement by asking for an injunction to restrain the defendant from receiving the proceeds of the sale of the property he had advertised for sale, and for a receiver, and upon that amendment his Lordship would grant an *interim* injunction against the defendant. The plaintiff should also cause an intimation to be made to the auctioneer that he was not to part with the money. Notice of motion against the defendant might be given for Thursday next.†

* 2 Charley's Cases (Court), 80.

† 1 Ch. D., 690; 45 L. J. (Ch.), 749; 24 W. R., 235.

ORDER V.

RULE 1.

(Issue of Writ of Summons from District Registry.)

See the case of *OGER v. BRADNUM*, reported under s. 64 of the Supreme Court of Judicature Act, 1873, *supra*, p. 132.

RULE 2.

(Notice to Defendant of option of appearing in District Registry or in London.)

See the case of *OGER v. BRADNUM*, reported under s. 64 of the Supreme Court of Judicature Act, 1873, *supra*, p. 132.

ORDER VI.

RULE 1.

(Issue of concurrent Writ of Summons.)

See the case of *DAVIES v. GARLAND*, reported under Order XIII., Rule 1, *infra*, p. 200.

RULE 2.

(Service of Notice of concurrent Writ.)

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

PROBATE.

(Before Sir JAMES HANMER, President.)
February 8th and 9th, 1876.

BEDDINGTON v. BEDDINGTON.

The plaintiffs, who were the executors of one *A writ*

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*of summons,
of which
notice was to
be served
out of the
jurisdiction,
issued as a
concurrent
writ with one
for service
within the
jurisdiction.*

Henry Moses, who died on the 3rd of December, 1875, propounded his will and codicils.

Inderwick, Q.C. (*Tristram* with him), applied to the Court to allow a writ of summons or notice of such writ of summons to be served out of the jurisdiction on Louis Nicholas Adolphe Mégret, a resident in Paris, the husband of one of the next of kin who was separated and living apart from him in England.

HANNEN, J., directed that a writ of summons should be issued and marked as concurrent, under Order VI., Rule 2, and that notice of the writ should be served on L. N. A. Mégret, under s. 19 of the Common Law Procedure Act, 1852.*

ORDER VIII.

RULE 1.

(Renewal of Writ of Summons.)

QUEEN'S BENCH DIVISION.

(Before COCKBURN, C.J., BLACKBURN and LUSH, JJ.)

January 13th, 1876.

DAVIES v. GARLAND.

*Where a writ
of summons
had been re-
newed prior to
the 1st Nov.,
1875, an ap-
plication for
its further
renewal, made
within six
months from
the first
renewal, was*

The original writ in this action was issued on the 16th of January, 1875, and renewed on the 14th of July, 1875. After renewal, the writ was lost. A copy of the lost writ was verified by affidavit.

Application was now made by *Francis*, on behalf of the plaintiff, for an order directing the proper officer to seal as a renewed writ a copy

* 1 P. D. 426; 45 L. J. (P. D. & A.), 44; 34 L. T., 366; 24 W. R., 348

on parchment of the copy writ annexed to the affidavit verifying the same. This would be a proceeding analogous to the renewal of writs under section 11 of the Common Law Procedure Act, 1852. [COCKBURN, C.J.—Suppose section 11 of the Common Law Procedure Act did not exist, we should have no power to renew a writ at all. That section requires certain formalities. How can we, whose right to interfere depends on that section, dispense with those formalities?] By virtue of the authority the Court has over its own procedure to prevent failure of justice. [LUSH, J.—It has been held that the Court is bound to refuse to renew a writ one day after the expiration of the statutory six months.] There was *laches* in that case. The plaintiff should not have let the time expire. Here the plaintiff has been guilty of no negligence. [COCKBURN, C.J.—But the losing of the writ is not the defendant's fault.] Here there is merely a misfortune. *Fisher v. Cox** is an instance where a writ was stamped *nunc pro tunc*: see Day's Common Law Procedure Acts.† If not under the Common Law Procedure Act, 1852, your Lordships can issue a concurrent writ under Order VI., Rule 2, of the Supreme Court of Judicature Act, 1875. [BLACKBURN, J.—The same objection applies. As we cannot renew a writ which does not exist, neither can we issue a writ concurrent

refused, on the ground that the writ had, since its first renewal, been lost. An application for the issue of a concurrent writ was also refused.

* 16 L. T., 397.

† P. 9.

with one which does not exist. And the time for renewal is past.]

The COURT refused the order.*

ORDER IX.

RULE 2.

(Substituted Service, or Substitution of Notice for Service, where Personal Service cannot be effected.)†

COURT OF APPEAL.

(Before JAMES, MELLISH and BAGGALLAY, L.JJ.)

August 9th, 1876.

SLOMAN AND CO. v. THE GOVERNOR AND
GOVERNMENT OF THE COLONY OF NEW ZEALAND.

As direct service cannot be made upon a fictitious corporation, such as "the Governor and Government of the Colony of New Zealand," so neither can substituted service.

This action was brought by Messieurs R. M. Sloman and Co., shipowners, of Hamburg, against "the Governor and Government of the Colony of New Zealand," to recover damages for the alleged breach of two emigration contracts, entered into on behalf of the Government of New Zealand, on the 14th of May, 1874. The contracts were made between Her Majesty the Queen, for and on behalf of the Colony of New Zealand, of the first part; Isaac Earl Featherston, of Westminster Chambers, Victoria

* 1 Q. B. D., 250; 45 L. J. (Q.B.), 137; 33 L. T., 727; 24 W. R., 252.

† See, also, *Pollock v. Campbell Brothers*, reported under Order II., Rule 6, *supra*, p. 191.

Street, the Agent-General in England for the Government of the said Colony of New Zealand, as agent for and on behalf of the said Government, of the second part; and Sloman and Co., of the third part; and provided for the conveyance of emigrants from the port of Hamburg to the Colony. By the New Zealand Immigration and Public Works Act, 1870 (33 and 34 Vict., No. LXXVII., s. 39), the Governor is empowered to enter into immigration contracts; and by the Immigration and Public Works Act Amendment Act, 1871 (35 Vict., No. LXXV., s. 4), it is provided that such contracts shall be entered into in the name of the Queen, her heirs and successors. By the Crown Redress Act, 1871 (35 Vict., No. XLIX., s. 2), any person having any claim or demand against Her Majesty the Queen, which may arise or accrue after the 1st of January, 1872, *within* the Colony of New Zealand, is enabled, with the consent of the Governor in writing, to file a petition of right in the Supreme Court of the Colony to enforce his claims. On the 17th of July a Divisional Court of the Common Pleas Division, consisting of Lord Coleridge and Mr. Justice Archibald, made an order for substituted service of the writ upon Mr. John Mackrell, a solicitor in London, who had acted as solicitor on behalf of the Government of the Colony in this country. Mr. Mackrell appealed from this order.

Edwyn Jones (with whom was *Benjamin, Q.C.*), in support of the appeal, urged that the order was entirely wrong. There were, in truth,

no defendants to the action, for the Governor and Government of the Colony were not a Corporation, nor was the Governor alone a Corporation. But though the order might be a nullity, Mr. Mackrell ought not to be compelled to run the risk of deciding whether he ought or ought not to appear on behalf of the Government. [MELLISH, L.J.—This is really an action against the Queen. I think it has been decided that you cannot have a petition of right in this country in respect of a colonial matter, because there would be no funds here to answer the demand.] The remedy is in the Colony. [JAMES, L.J.—This proceeding seems to me so utterly new and strange, that I should like to hear what the other side have to say.]

Watkin Williams, Q.C., on behalf of the plaintiffs, urged that the only question now to be decided was, whether substituted service should be allowed. Whether the action could be sustained was a question which did not arise now. [JAMES, L.J.—Are you entitled to have an order for substituted service on a fictitious non-entity? MELLISH, L.J.—You must show *primâ facie* that there is an existing defendant.] I contend that the effect of the Colonial Statutes is to incorporate the Governor and Government for the purpose of entering into these contracts. [MELLISH, L.J.—But the contract is in the name of the Queen.] The Common Pleas Division thought that this important question ought not to be decided on this summary motion. But if I have to go into the merits, then I say

that if we cannot sustain this action we are without remedy. The remedy by petition of right in the Colony is only in respect of matters arising in the Colony, and this contract was made in Europe. A petition of right in England would be of no avail. I contend that the Queen and Mr. Featherston are merely nominal parties to the contract; the real parties are the Governor and Government of the Colony. [MELLISH, L.J.—You never can get paid unless the New Zealand Assembly finds the money. You cannot sue the Governor in the Colony even for a private debt of his own. Surely this Court ought not to allow a judgment to be obtained which cannot be enforced. BAGGALLAY, L.J.—How can you have substituted, unless you could have direct service? MELLISH, L.J.—An order for substituted service cannot be made without the leave of the Court or a Judge. I think the Court is bound to see, before making such an order, whether there is any defendant who could be served directly.] We are willing to take the order at our peril.

Edwyn Jones was not called upon for a reply.

JAMES, L.J., was of opinion that the Court ought to deal with the real question now. No good could result from postponing the decision. In order that substituted service might be directed, there must be some defendant upon whom direct service could be effected. In the present case there was no body corporate or politic on whom direct service could be made. There was no one in New Zealand who could

be served directly. A plaintiff might just as well summon the President and Government of the United States, or the Emperor of Russia, and then get an order for substituted service on the ambassador here, because they could not be served personally. There was, no doubt, some difficulty in suing a Sovereign body, or a body *quasi* Sovereign; but, still, there was no such entity as the Governor and Government of New Zealand. There was a Governor for the time being, and persons carrying on the Government, but to talk of them as forming a corporation was absurd.

MELLISH, L.J., was of the same opinion. The Common Pleas Division had not decided the question whether the action could be maintained against the Governor and Government of New Zealand. They seemed to have thought it very doubtful whether it could, but they considered that the question ought not to be decided now. His Lordship was of opinion that the question ought to be decided at once, for, if substituted service was allowed, and the Governor of New Zealand did not choose to appear, as he most probably would not, then judgment would go by default against the defendants. The Court ought to determine first whether it could order direct service of the writ of summons in New Zealand. Would it be possible or right to order the writ to be served on the Governor and Government in New Zealand? The Colonial Act provided that contracts on behalf of the Government should be made in the name of the

Queen. The plaintiffs must be taken to have had full notice of this, and of the well-known rule of law that in such a case the other party to the contract has no remedy but by a petition of right, and that a ministerial officer who enters into such a contract cannot be sued in his own name, unless, indeed, he had committed some illegal act. There could be no action upon the contract. No Colonial Act had constituted the Governor of New Zealand a corporation sole; it was doubtful, indeed, whether there was any power to do so. But the Colonial Legislature had not attempted to do this; they had, on the contrary, provided that all contracts on behalf of the Government should be made in the name of the Queen, and this was for the express purpose of preventing their agents incurring liability on the contracts; it was in order that they might retain in their own hands the power of determining how the moneys of the Colony should be expended. No injustice could arise from this, for every one who entered into a contract of this kind had full notice of these provisions. The Governor and Government of New Zealand were not a corporation. This being so, it would not be right to make the Governor come in and appear to this writ, and, therefore, it would not be right to make this order for substituted service.

BAGGALLAY, L.J., was of the same opinion. Order IX., Rule 2, provided that an order for substituted service might be made where it is shewn to the Court that the plaintiff

cannot effect prompt personal service. Therefore, it could only be made in a case where direct service would be possible. It was not intended that there should be substituted service in a case where the plaintiff really did not know whom he ought to serve directly.

Appeal allowed; order discharged, with costs.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Sir CHARLES HALL, V.C.)

February 16th, 1876.

RAFAEL v. ONGLEY.

Where the writ of summons, in an action for the delivery up of title deeds to land in Persia, could not be served on the defendant personally, and he had only one known address in London, notice in lieu of service of the writ was directed to be sent to that address, and to be inserted in the Times, London Gazette, and one other London daily newspaper.

This was an action for the delivery to the plaintiff of title deeds relating to a garden and other property in a village near Teheran, in Persia. The writ was issued on February 4, 1876; the only known address of the defendant in London was the Thatched House Club. The solicitors who had appeared for the defendant in some former proceedings refused to accept service of this writ on his behalf.

Renshaw asked for directions as to giving notice under Order IX., Rule 2, in substitution for service. He referred to Consolidated Order X., Rule 6, as to the mode of giving notice by advertisement where a cause was taken *pro confesso*, to *Barton v. Whitcombe*,† and to the numerous cases where advertisements for creditors are allowed.

* 1 C. P. D., 503; 46 L. J. (C.P.), 185; 35 L. T., 454; 25 W. R., 86; *Times*, Thursday, August 10th, 1876.

† 17 Jur., 81.

HALL, V.C., asked whether there was any analogous practice in the Common Law procedure; and, none having been cited, directed that advertisements should be inserted in the *London Gazette*, the *Times*, and one other morning London newspaper, and that a letter should be sent to the defendant at the Thatched House Club, and to the solicitors who acted for him in former proceedings and in proceedings now pending in the cause; and as to the time for appearance, after referring to the ordinary writ, which limits eight days, he refused to name any additional time for appearance, as the defendant might, under the new Rules, appear at any time before judgment.*

CHANCERY DIVISION.

(Before Sir CHARLES HALL, V.C.)

February 17th, 1876.

CRANE v. JULLION.

The plaintiff was the representative of the mortgagor and also of the mortgagee (both deceased) of ten leasehold houses. This was an action to recover the rents and possession of the houses, and also for an account, an injunction, and a receiver. The defendant had been appointed by the mortgagee his agent to collect the rents, but had recently claimed the houses as his own, and given notice to the

Where the defendant, a collector of the rents of leasehold houses, had absconded and could not be found, and the tenants of the houses refused to pay their rents, substituted service of

* 34 L. T., 124; 11 N. C., 47.

the writ of summons, in an action to recover possession of the houses, was directed to be effected by leaving a copy of the writ at each of the houses, and by inserting advertisements in the London Gazette and the Times.

tenants not to pay their rents to any one but him; he had, however, suddenly absconded, taking his furniture with him, and could not be found.

Everitt, for the plaintiff, asked the direction of the Court as to how the plaintiff was to effect service, and what advertisements were necessary in the case of an absconding defendant; and he also asked for a receiver. Under the old practice, he said, the writ might have been served on a tenant of the lands. The present action was practically an action of ejectment.

HALL, V.C.—You may serve the writ of summons by leaving a copy of it at each of the houses, and you must advertise in the *London Gazette* and in the *Times*. I give no direction as to time. The ordinary eight days will run from the time of serving the copies of the writ and issue of the advertisements, whichever is latest in date. You may also take an order for the appointment of a receiver.

The following is a minute of the order made:—

“Order for appointment of receiver. Refer it to chambers to appoint receiver. Order for substituted service by serving copy writ at each house, and advertising in the *London Gazette* and the *Times* that the action has been commenced, and that the Court has authorized service by leaving copy writ with the tenant of each house and by these advertisements, and that the defendant is required to appear; otherwise the action will proceed against him as for

default of appearance. Costs to be costs in the action.”*

CHANCERY DIVISION.

(Before SIR CHARLES HALL, V.C.)

February 14th, 16th, and 19th, 1876.

COOK v. DEY.

This was an administration action against trustees, one of whom had absconded and been adjudicated a bankrupt. Attempts to serve the writ upon him had been made, both at his office, where one of his clerks was assisting a receiver in winding up his business, and at the lodgings he had recently occupied. The clerk could give no information as to the whereabouts of the defendant, but said he believed he was not in England. At his lodging nothing was known about him except that letters had been waiting there for him for some weeks.

Pope applied *ex parte* for an order for substituted or other service on this defendant, or for the substitution of notice for service on him, on the ground that the plaintiff was “unable to effect prompt personal service.” He referred to Order IX., Rule 2, and to *Capes v. Brewer*.†

HALL, V.C., at first declined to make any order, on the ground that the affidavit in support of the application did not show that there was any probability of substituted service coming to

Where the defendant, a trustee, had absconded and was believed to be abroad, substituted service of the writ of summons, in an administration suit, was directed to be effected by leaving copies of the writ at the defendant's office, and at his last-known lodgings, and by inserting notice of the order in the Times.

* 2 Ch. D., 220; 24 W. R., 691; 11 N. C., 58.

† 24 W. R., 40; W. N., 1875, p. 193; 1 Charley's Cases, (Court), 90.

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the knowledge of the defendant; but, on the matter being mentioned again, his Lordship made an order for substituted service by leaving copies of the writ at the defendant's office and last-known lodgings, and inserting a notice of it in the *Times*. No time would be limited for appearance; and if the defendant failed to appear within eight days, the plaintiff might take the usual proceedings in default of appearance.*

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

PROBATE.

(Before SIR JAMES HANNEN, J.)

June 20th, 1876.

WHITLEY v. HONEYWELL.

In a Probate action substituted service of the writ of summons was directed to be made upon the husband, who could not be found, the wife, who was joined as co-defendant, being served directly.

Charlotte Hunt, widow, died at Southampton on the 5th of February, 1876, having, on the 31st of May, 1865, executed a will, by which she left her property to the plaintiff and another upon trust for her son, Henry Hunt, and her daughter, Anne Davis. The surviving executor propounded the will, which was contested, on the ground of the insanity of the testatrix, by another daughter (to whom she had left nothing), Mary, who was married to Thomas William Quelch Honeywell. Mary Honeywell had been deserted by her husband, and neither she nor his solicitors knew his address. His solicitors declined to accept service on his behalf.

* 2 Ch. D., 218; 45 L. J. (Ch.), 611; 24 W. R., 362.

Candy moved the Court to order substituted service upon T. W. Q. Honeywell, under Order IX., Rule 2, or to dispense with service upon him altogether, under Rule 3 of the same Order. Under the old practice the substituted service would have been by advertisement, but it might be questioned whether there was now power to advertise the writ.

HANNEN, J.—Under Order IX., Rule 2, the Court or a Judge has a general power of directing in what way substituted service shall be effected. This includes service by advertisement, and the power formerly exercised by the Court of Probate of advertising the citation is now extended to all the Divisions. The husband must be served by advertisement in English and South Wales newspapers, subject to the settlement of the details by the Registrar.*

RULE 3.

(Service of Writ of Summons on wife without Service of Husband.)

See the case of WHITLEY v. HONEYWELL, reported under Rule 2 of this Order, *supra*, p. 212.

RULE 6.

(Service of Writ of Summons on a Partnership.)

See the case of POLLOCK v. CAMPBELL BROTHERS, reported under Order II., Rule 6, *supra*, p. 191.

* 35 L.T., 517; 24 W.R., 851.

RULE 13.

(Indorsement on Writ of Summons of day of month and week of the Service within three days after Service.)

CHANCERY DIVISION.

(Before Sir GEORGE JESSEL, M.R.)

June 2nd, 1876.

DYMOND v. CROFT.

The provisions of Order IX., Rule 13, are not applicable to substituted service.
Cruse v. Kuttingell, 1 Charley's Cases (Chambers), 40, followed by the Court of Appeal.
Decision of Jessel, M.R., erruiled.

It being impracticable to effect personal service on the defendant in this case, an order had been obtained under Order IX., Rule 2, for substituted service on one of the members of a firm of solicitors who had formerly acted for the defendant in other matters, notice of the writ being at the same time ordered to be posted to the defendant at his last-known address in this country.

The defendant did not appear, and the plaintiff obtained judgment for foreclosure by default, but the Registrar refused to draw up the order, on the ground that the date of service of the writ of summons had not been indorsed on the writ, and, consequently, that in accordance with the express terms of Order IX., Rule 13, the plaintiff was not at liberty to proceed by default.

The matter was then brought before the Master of the Rolls.

Cozens-Hardy, for the plaintiff, stated that the Clerk of Records and Writs had certified to the regularity of the proceedings.

THE MASTER OF THE ROLLS said that the Registrar was quite right to stop the order; the rule was express, that, unless the date of service was indorsed, "the plaintiff" should "not be at liberty to proceed by default." As regarded

the certificate of the Clerk of Records and Writs, it was not the intention of the new Rules that the burden should be thrown on the officers of the Court of ascertaining that each step was regular; but parties must proceed at their own peril. The plaintiff must begin *de novo* by again serving the writ of summons, and indorse the date of service pursuant to the Rule.*

June 13th, 1876.

DYMOND v. CROFT.

Cozens-Hardy again mentioned this case, and called the attention of the Court to *Cruse v. Kuttingell*,† where, in a similar case, Huddleston, B., had held that it was not necessary to indorse the writ in the manner described in Order IX., Rule 13.

THE MASTER OF THE ROLLS said that he should decline to follow that decision. The rule was plain that "the person serving a writ of summons shall within three days at most after such service indorse on the writ the day of the month and week of the service thereof." The word "service" meant every kind of service, and included substituted service as well as ordinary service.‡

COURT OF APPEAL.

(Before JAMES and BAGGALLAY, L.JJ., and LUSH, J.)

June 24th, 1876.

DYMOND v. CROFT.

The plaintiff appealed from the decision of the Master of the Rolls.

* W. N., 1876, p. 193; 24 W. R., 818; 45 L. J. (Ch.), 604; 34 L. T., 786.

† 1 *Charley's Cases* (Chambers), 40.

‡ 3 Ch. D., 512, 514; W. N., 1876, p. 196; 24 W. R., 818; 45 L. J. (Ch.), 604; 34 L. T., 786; 11 N. C., 138.

Cosens-Hardy referred to the case of *Cruse v. Kuttingell*,* before Huddleston, B., at chambers, in which his Lordship had been of opinion that the indorsement was necessary only when the writ had been personally served. The Master of the Rolls, however, considered himself bound by the words of Order IX., Rule 13, and refused to follow that case. [LUSH, J.—There are cases where the indorsement cannot be made, as when the order directs the process to be effected through the Post Office. JAMES, L.J.—Sending by post is notice instead of service. The question is whether, when you are directed actually to serve some person with the writ, Order IX., Rule 13, does not apply just as much as when you serve the guardian of an infant instead of the infant himself. LUSH, J.—The rule was imported into the Rules of Court from the Common Law Procedure Act, 1852, s. 15, which was necessarily confined to cases of personal service, as, at Common Law, there was no such thing as substituted service.] The indorsement is quite immaterial for the purpose of practical justice; it is a mere proceeding in the office of the plaintiff's solicitor, which does not affect the defendant one way or the other. At any rate, the Court could exercise the power given it by Order LIX., of dispensing with compliance with Order IX., Rule 13.

JAMES, L.J.—I will not say what our decision might have been if this had been the first case in which this question had arisen. But it is very

* 1 Charley's Cases (Chambers), 40.

important that the practice should be uniform in this matter. Baron Huddleston decided the point in the first instance in accordance with the common understanding on the subject, and his decision has ever since been followed at chambers. It is not a matter in which any substantial injustice can arise from our following his decision, and as it is better that in these cases that the first decision should be followed, I think we should adopt Baron Huddleston's view.

BAGGALLAY, L.J.—I am of the same opinion.

LUSH, J.—I am of the same opinion. The rule does not seem to be applicable to a state of things in which substituted service may be made in such ways as by post or by advertisement in a newspaper.*

ORDER X.

(Affidavit of Substituted Service.)

See the cases cited under Order IX., Rules 2 & 13, *supra*.

ORDER XI.

RULE 1.

(Service of Writ of Summons or of Notice of Writ of Summons out of the Jurisdiction.)

HIGH COURT OF JUSTICE.

EXCHEQUER DIVISION.

(Before KELLY, C.B., and BRAMWELL and AMPHLETT, BB.)
February 23rd, 1876.

WESTMAN v. THE AKTIEBOLAGET EKMANS
MEKANISKA SNICKAREFABRIK COMPANY.

This was an application on behalf of the *defendant* of

* 3 Ch. D., 512; 45 L. J. (Ch.), 604; 24 W. R., 842; 34 L. T., 786; *Times*, Monday, June 26th, 1876; W. N., 1876, p. 208; 11 N. C. 145.

summons may be issued against a foreign corporation, although it has no place of business within the jurisdiction, but notice of the writ, and not the writ itself, must be served.

defendants, a foreign corporation, having no place of business in this country, to set aside a writ of summons, the service of the writ, and all subsequent proceedings, together with an order made at chambers under which the writ was issued and served.

The defendants, who carried on business at Stockholm as joinery manufacturers, were sued by the plaintiff for the non-delivery of deals sold by them to him.

The plaintiff, having obtained an order at chambers, under Order II., Rule 4, for leave to issue and serve the writ of summons out of the jurisdiction upon the defendants, served them with a copy of the writ,* and also with a statement of claim, at their place of business at Stockholm.

Vaughan Williams, for the defendants, in support of the motion.—In the first place a writ cannot be issued against or served upon a foreign corporation having no place of business in this country. The service of process upon foreigners abroad was governed by section 19 of the Common Law Procedure Act, 1852, and in *Ingate v. The Austrian Lloyd's Company*† it was decided that that section did not apply to a foreign corporation whose place of business is abroad. There is nothing in the Supreme Court of Judicature Acts which alters the law. Secondly, if the defendants can be served with process at all, it is clear from Order II., Rule 4,

* The writ was in the Form No. 2 of Part 1 of Appendix (A); 21 days were given the defendants to appear.

† 4 C. B., N. S., 704; 27 L. J. (Ch.), 323; 6 W. R., 659.

and Order XI., Rule 1, that they should have been served with notice of the writ, and not with the writ itself. By section 19 of the Common Law Procedure Act, 1852, foreign individuals must have been so served, and must still be so served, and, if foreign corporations can be served at all, they can only be served in the same way as foreign individuals. *Newby v. Van Oppen*.* Per Blackburn, J.

Lumley, for the plaintiff.—First, by section 100 (the Interpretation Clause) of the Supreme Court of Judicature Act, 1873, the word “defendant” is to “include every ‘person’ served with any writ of summons or process, or served with notice of any proceedings;” and by Order LXIII., “person shall include a body corporate.” Therefore, if a foreign individual can be sued, so can a foreign corporation. The effect of the judgment of Mr. Justice Blackburn, in the case of *Newby v. Van Oppen*,† is that there is no objection to foreign corporations abroad being sued, provided there is a proper machinery for service, which machinery the Supreme Court of Judicature Acts now give. Order XI., Rule 1, is quite general in its terms, and contains no restrictions whatever as to defendants. Before the Supreme Court of Judicature Acts foreign corporations resident abroad could have been sued in Equity. Section 19 of the Common Law Procedure Act, 1852, is now, by implication, repealed. Secondly,

* L. R., 7 Q. B., 293; 41 L. J. (Q. B.), 148; 20 W. R., 263.

† *Ubi supra*.

the service of the writ itself was the proper mode of service. Before the Supreme Court of Judicature Acts the defendant in Equity was served with the Bill of Complaint by leave of the Court. Order XI., Rule 1, gives the Court a discretion as to whether leave should be granted to serve the writ or notice of the writ.

Vaughan Williams, in reply.—I can find no authority in any book of Chancery practice for the statement that a foreign corporation could in Equity have been served with process before the Supreme Court of Judicature Acts. At all events, the Rules were intended to assimilate the Chancery to the Common Law practice.

KELLY, C.B.—The first question before us is whether a writ may issue against a foreign corporation resident abroad, not whether an action against them will lie. I am of opinion that such a writ may issue, for I can see nothing that makes it unlawful, or against the comity of nations, for any subject in this country to issue a writ against a foreign corporation resident abroad; nor is there any provision in the Supreme Court of Judicature Acts which prevents him from doing so. Consequently, the application to set aside the writ must be refused.

The application to set aside the service of the writ must be granted. Sections 18 and 19 of the Common Law Procedure Act, 1852, authorized the issuing of a writ against a British subject resident abroad, or a foreigner resident out of the jurisdiction. In the former case the writ itself had to be served, in the latter a notice in lieu of writ. Now, is there any provision in

the Supreme Court of Judicature Acts which alters that practice? The only alteration is, that by Order II., Rule 4, "no writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a Court or Judge." The distinction between service of the writ and of notice of it is intended to be continued; if foreign corporations can be now served with process at all—on which I pronounce no opinion—they must be served in the way in which foreign individuals were served, namely, with notice, and not with the writ.

BRAMWELL, B.—I am of opinion that we ought not to set aside the order or the writ, foreign corporations being suable in this country. That was decided in the case of *Newby v. Van Oppen*.* There is nothing, therefore, to prevent a writ from being issued against the defendants in this case. Suppose the defendants were at some subsequent time to establish offices in London, this writ might be kept alive, and could be made available as a bar to the Statutes of Limitations. I think that process could be effected on the defendants out of the jurisdiction by serving notice of the writ, and my reasons for thinking so are these: Before the Supreme Court of Judicature Acts came into operation, I think that in Equity foreign corporations resident abroad might have been served, although no doubt the case was different at Common Law. The word "defendant" in Rule 7 of the Xth

* *Ubi supra*.

of the Consolidated Orders of the Court of Chancery, included, in my opinion, a foreign corporation. I do not think that it was the intention of the Supreme Court of Judicature Acts to take away the power of serving a foreign corporation. I think that it was intended to put proceedings at Common Law in the same plight as in Equity, and that therefore, by implication, the Supreme Court of Judicature Acts have practically repealed the interpretation put upon the word "person" in section 19 of the Common Law Procedure Act, 1852, in the case of *Ingate v. The Austrian Lloyd's*.* Therefore, I think the writ is valid, on the two grounds, that the defendants are suable, and that they may also, in my judgment, be effectively served. On the latter point, however, I express an opinion, with a perfect right of reconsideration when the occasion shall really arise finally to determine the question.† With regard to the kind of service, it seems to me to be clear that if foreign corporations can be served at all, the process must be by service of notice of the writ. If, by implication, section 19 of the Common Law Procedure Act, 1852, now comprehends foreign corporations as well as individuals, it comprehends them in the same plight as foreign individuals. Process must therefore be effected upon them in the same way as upon foreign individuals, namely, by service of notice of the writ. So much, therefore, of

* *Ubi supra*.

† The question was finally settled in *Scott v. The Royal Wax Candle Company*, reported *supra*, p. 179.

the present application as asks for a rescision of the writ must be refused, and so much of the application as asks to set aside the service must be granted.

AMPHLETT, B.—I am of the same opinion. It appears to me that there is nothing in the Supreme Court of Judicature Acts to exclude the power of the Court to serve foreign corporations resident abroad with process.

Before the Supreme Court of Judicature Acts, no leave of the Court was required at Common Law for serving process upon a foreigner resident out of the jurisdiction, but there was no provision as to the mode of service, and hence the difficulty raised in *Ingate v. The Austrian Lloyd's** as to serving a foreign corporation. But in Equity this difficulty did not exist. You had to get leave from a Judge, and the Judge would direct the particular mode of service. Now, however, by Order II., Rule 4, no writ for service out of the jurisdiction is to be issued except by leave, and the procedure now would be what it was in Equity. The Judge would give directions as to how service should be effected. There is no restriction in the Supreme Court of Judicature Acts as to the person served, and I cannot see why, when you are satisfied that a foreign corporation can be easily served, it should not be served. In *Lewis v. Baldwin*† it appears to have been assumed that a foreign corporation resident out of the jurisdiction could be served; and,

* *Ubi supra.*

† 11 Beav., 153; 17 L. J. (Ch.), 377.

as a matter of fact, I know that foreign corporations are often made defendants in Equity; but of course the point which we are now discussing may never have been taken. I think, therefore (though I reserve my opinion for further consideration when the occasion shall arise*), that process can now be served upon foreign corporations resident abroad. But the service must be by service of notice of the writ, and not by service of the writ itself. The service therefore of the writ in this case must be set aside.

Application to set aside the writ and the order (except as regarded striking out of the order the words "to serve the writ") refused; application to set aside the service of the writ granted.†

PROBATE, DIVORCE AND ADMIRALTY DIVISION.
ADMIRALTY.

(Before Sir ROBERT PHILLIMORE, J.)

May 16th, 1876.

Re SMITH AND OTHERS.

A writ of summons, of which notice is to be served out of the jurisdiction, cannot be issued against a foreign company resident abroad to recover

In January, 1876, the British steamship "City of Mecca," being about nine miles from the mouth of the river Tagus, and upon the high seas, came into collision with the steamship "Insulana," belonging to the Empresa Insulana Company—a company carrying on business at Lisbon. Considerable damage was done to the "City of Mecca."

* The question was finally decided in *Scott v. The Royal Wax Candle Company*, *supra*, p. 179.

† *Ex. D.*, 237; 45 *L. J. (Ex.)*, 327; 24 *W. R.*, 405; *Times*, Feb. 24th, 1877.

An application was made by summons at chambers, on behalf of the owners of the "City of Mecca" (Smith and others), under Order II., Rule 4, and Order XI., Rule 1, that a writ of summons, of which notice was to be served out of the jurisdiction, indorsed with a claim for compensation for the damage, might be issued against the Empresa Insulana Company.

The Judge having adjourned the summons into Court,

E. C. Clarkson, on behalf of the owners of the "City of Mecca," contended that, the collision having occurred on the high seas, which is within the Admiralty jurisdiction, the act done was done within the jurisdiction, and that under Order XI., Rule 1, and Order II., Rule 4, the Court had power to order the writ to issue, and to direct service of notice of the writ out of the jurisdiction.

Sir ROBERT PHILLIMORE.—In this case the Court would, if the "Insulana" could have been arrested within the territorial jurisdiction, have had jurisdiction so far as the *res* was concerned; but it would under the old law have possessed no jurisdiction *in personam* over the owners of the *res* unless they could have been served with a citation within the territorial jurisdiction. I do not think that the Legislature, in enacting Order XI., Rule 1, contemplated any alteration in the law in cases similar to the present, and under the circumstances I am not satisfied that I can grant the leave asked for. If I acceded to the application I should be exercising a juria-

compensation in respect of damages inflicted on an English ship by a ship sailing under a foreign flag and owned by the foreign company, which came into collision with it on the high seas, out of the territorial jurisdiction.

diction *in personam* over persons for doing an act at a time when they were without the territorial jurisdiction of this Court.

Motion refused.*

* 1 P. D., 300; 35 L. T., 380; 24 W. R., 903.

The circumstances under which the application was made appeared from an affidavit in which one of the members of the firm of solicitors retained on behalf of the owners of the "City of Mecca" deposed in substance as follows:—

"1. The Empresa Insulana Company carry on business at Lisbon, in Portugal, and to the best of my knowledge and belief they are and may be found there.

"2. The members of the company are not, to the best of my knowledge and belief, British subjects.

"3. The intended action is on behalf of George Smith and others, the owners of the British steamship 'City of Mecca,' against the defendants, the owners of the steamship 'Insulana,' of the Port of Lisbon, and which steamship is registered at Lisbon as belonging to" . . . [certain foreign firms residing at Lisbon or elsewhere abroad,] "and all of them directors of the Empresa Insulana Company.

"4. The claim in the intended action is for damages occasioned to the said steamship 'City of Mecca' by a collision between her and the said steamship 'Insulana,' which took place on the high seas about nine miles from the mouth of the River Tagus, in the month of January, 1875, and resulted in the total loss of the 'Insulana' and considerable damage to the 'City of Mecca.'

"5. Proceedings are pending at Lisbon against the owners of the 'City of Mecca,' to recover damages in respect of the loss of the 'Insulana,' and the aid of this Court is requisite and necessary to enable the owners of the 'City of Mecca' to obtain compensation for the damages sustained by their vessel.

"6. I derive my knowledge of the above facts from information gained by me when at Lisbon engaged in the matter in the course of last year."

RULE 1A.

(Qualification of the right of Service of Writ of Summons or of Notice of Writ of Summons in Scotland or Ireland.)

This new Rule was made in consequence of the following decision* :—

QUEEN'S BENCH DIVISION.

(Before COCKBURN, C.J., and MELLORE and LUSH, JJ.)
May 27th, 1876.

GREEN v. BROWNING.

This was an action for work done in constructing a skating rink in Dublin, and therefore out of the jurisdiction, under a contract made in London, where the plaintiff resided. The defendant lived in Dublin. Breach also in London by non-payment. AMPHLETT, B., at chambers, had made an order allowing service of the writ of summons on the defendant in Ireland under Order XI., Rule 1. It was now sought to set aside the service, which had subsequently been effected, on the ground that the Supreme Court of Judicature Acts did not authorize the service of a writ in Ireland.

A writ of summons for service out of the jurisdiction may be served upon a British subject resident in Ireland, for non-payment by him in England for work done by the plaintiff in Ireland under a contract made in England.

C. S. C. Bowen for the defendant.

Horne Payne for the plaintiff.

The COURT refused the motion, holding that Ireland came clearly within Order XI., Rule 1, and that the Judge had jurisdiction, therefore,

* See the *Times*, Monday, May 29th, 1876, cited in the Third Edition of "Charley's Judicature," p. 419.

to make the order allowing the service. As to the particular case, it was precisely one which the Rule was designed to include.*

RULE 2.

(Service of Writ of Summons or of Notice of Writ of Summons out of the jurisdiction in the Probate Division.)

See the case of *BEDDINGTON v. BEDDINGTON*, reported under Order VI., Rule 2, *supra*, p. 199.

ORDER XII.

RULE 3.

(Option to appear either in London or in District Registry.)

See the case of *OGER v. BRADNUM*, reported under section 64 of the Supreme Court of Judicature Act, 1873, *supra*, p. 132.

ORDER XIII.

RULE 5.

(Proceedings in default of Appearance, where the Claim is for a debt or liquidated demand, and the Writ of Summons is not specially indorsed.)

See the case of "*THE POLYMEDE*," reported under section 18 of the Supreme Court of Judicature Act, 1875, *supra*, p. 156.

* 34 L. T., 760; W. N., 1876, p. 190.

RULE 9.

(Proceedings in default of Appearance in the
Chancery Division.)

HIGH COURT OF JUSTICE.
CHANCERY DIVISION.

(Before SIR GEORGE JESSEL, M.R.)

January 27th, 1876.

THE PROVIDENT PERMANENT BUILDING
SOCIETY v. GREENHILL.

This was a motion, *ex parte*, on behalf of the plaintiffs, that they might be at liberty to proceed with the cause as against the defendant Greenhill in the same manner as the cause would have been proceeded with previous to the Supreme Court of Judicature Acts; or for directions as to how the cause should be proceeded with.

Bill of Complaint treated as a Statement of Claim to enable the plaintiff to file an affidavit of service (under Order XIII., Rule 9), in default of appearance, and proceed under Order XXIX., Rule 10.

The Bill was filed on the 11th of June, 1875, and was served on the several defendants, who were also subsequently served with interrogatories. The defendant Alfred Greenhill failed to enter an appearance or to put in an answer. The plaintiffs had not entered an appearance for him.

Cozens-Hardy, for the plaintiffs, referred to *Culley v. Buttifant*.* Order XIII., Rule 9, and Order XXIX., Rule 10.

Phear, for Mrs. Greenhill.†

THE MASTER OF THE ROLLS said that *Culley v. Buttifant* did not apply, as the defendant Alfred Greenhill had not appeared, and he

* Reported, 1 Charley's Cases (Court), 108.

† See W. N., 1876, p. 185.

ordered that the cause should proceed under the new practice, and that the Bill should be treated for all purposes as if it were a statement of claim, so that the plaintiffs might proceed under Order XIII., Rule 9, and Order XXIX., Rule 10.*

CHANCERY DIVISION.

(Before Sir CHARLES HALL, V.C.)

February 3rd, 1876.

SHEPHARD V. BEANE.

Order XIII., Rule 9, must be read with Order XIX., Rule 6; and the plaintiff should, therefore, file, in default of appearance, in the Chancery Division, not only an affidavit of service of the writ of summons, but also of "every pleading or other document required to be delivered to" the defendant.

This was an action for redemption and foreclosure, brought by a second mortgagee against the mortgagors, the first mortgagees, and two equitable sub-mortgagees, whose sub-mortgages, which were of different dates, more than exhausted all that was due on the first mortgage.

The plaintiff first gave notice of motion for a receiver, each of the defendants, the sub-mortgagees, then gave a like notice of motion for a receiver, extending over the several parts of the estate included in the first mortgage which were comprised in their respective sub-mortgages. The motions came on together.

The defendants, the mortgagors, had not appeared in the action. The plaintiff was proceeding against these defendants under Order XIII., Rule 9, and Order XIX., Rule 6, and had filed at the Record and Writ Clerks' office an

* 1 Ch. D., 624; 45 L. J. (Ch.), 272.

affidavit of the service of the writ, the statement of claim, the notice of motion, the affidavit in support, and a notice of filing it.

Eddis, Q.C., and *Cozens-Hardy*, for the plaintiffs, mentioned that this was the first case in which the new procedure had been thus applied in the case of a defendant in default of appearance, and that the Record and Writ Clerks had felt some difficulty as to what was the proper practice with regard to the filing of documents.

HALL, V.C., thought that the proper course had been followed.*

CHANCERY DIVISION.

(Before Sir JAMES BACON, V.C.)

April 26th, 1876.

GARDINER v. HARDY.

In a foreclosure suit, commenced before the 2nd of November, 1875, against two defendants, both in New Zealand, the property being in this country, each of the defendants had, under an order made in January, 1875, been served with a copy Bill and interrogatories, and copy of the order, and after the expiration of the time limited neither of the defendants had appeared.

C. T. Mitchell, on behalf of the plaintiff, now moved for an order to proceed with the cause as if the defendants had appeared (Order XIII., Rule 9); for leave to file a traversing

The old practice in Chancery suits of filing a traversing note in default of an answer is no longer applicable. The rule in the Provident Permanent Building Society v. Greenhill followed.

* W. N., 1876, p. 61. Reported upon a different point, *supra*, p. 58.

note without entering an appearance for the defendants, and thereupon to deliver a reply joining issue, and any other document which might be required to be delivered, according to the provisions of Order XIX., Rule 6 (viz., by filing them with the proper officer); for leave to serve on the defendants in New Zealand a copy of the traversing note when filed, and notice of such joinder of issue, together with the order, and also notice of trial; and for leave after such notice should have been served, to set the cause down for trial, but not until the expiration of six months after service on the last-named defendants; and for leave to prove the service and the facts alleged in the Bill by affidavit (Order XXXVIII., Rule 1); and if no appearance should have been entered for the defendants before trial, for leave to proceed under the decree without further service on, or notice to the defendants; the defendants to be at liberty to move to vary or discharge the order (Order LIII., Rule 3).

BACON, V.C., said that he could not order the evidence to be taken by affidavit. In other respects the order would be according to the notice of motion.*

May 30th, 1876.

GARDINER v. HARDY.

The Registrar had objected to draw up that part of the order which gave leave to file a tra-

* W. N., 1876, p. 153; 11 N. C., 95.

versing note,* on the ground that it was no longer the practice.

C. T. Mitchell explained that he had asked for leave to serve the defendants abroad in consequence of a decision of Vice-Chancellor Hall on the 16th of March in a case of *Cook v. Dey*,† where his Lordship appeared to be of opinion that a notice of motion for judgment was not within Order XIX., Rule 6. Since then the Master of the Rolls had considered the question, and had come to the conclusion that a notice of motion for judgment was a document which could be filed in accordance with that order: *Dymond v. Croft*.‡ Accordingly the Court was no longer asked for leave to serve the defendants abroad with notice of motion. It was now wished that the cause might be ordered to proceed under the new practice, and the Bill be treated as if it were the plaintiff's statement of claim, so that the plaintiff might proceed under Order XIII., Rule 9, and Order XXIX., Rule 10, as in *Provident Building Society v. Greenhill*.

The following were minutes of the order asked for:—

Upon motion made by Counsel for the plaintiff, who alleged that pursuant to an order dated the 21st of January, 1875, the defendant John Hardy was on the 19th of July duly served at Oamaru, in the province of Otago, in the colony

* "The plaintiff intends to proceed with the Bill as if the defendant had filed an answer traversing the case made by the Bill."

† 2 Ch. D., 218; 45 L. J. (Ch.), 611; 24 W. R., 262.

‡ 3 Ch. D., 512; 45 L. J. (Ch.), 612; 35 L. T., 27; 24 W. R., 700.

of New Zealand, with a printed copy of the plaintiff's Bill filed in this cause, together with a copy of the interrogatories filed for the examination of the defendant John Hardy, in answer to the Bill, and a copy of the said order, as by the affidavit of Thomas William Hislop filed the 20th of April, 1876, appears; that on the said 19th of July, 1875, the defendant John Hardy was also served at Oamaru aforesaid with a copy of the order dated the 12th of February, 1875, giving the plaintiff liberty to change his solicitor, as from the said affidavit of Thomas William Hislop also appears; and that pursuant to the said order dated the 21st of January, 1875, the defendant James Doughty was on the 4th of May, 1875, duly served at Dunedin, in the said colony of New Zealand, with a printed copy of the plaintiff's Bill filed in this cause, together with a copy of the interrogatories filed for the examination of the defendant James Doughty, in answer to the said Bill, and a copy of the said order, as by the affidavit of Charles Cargill Kettle filed the 20th of April, 1876, appears; but neither of the said defendants has entered an appearance to the said Bill, as by the Record and Writ Clerk's certificate appears, and upon reading the said orders, affidavits, and certificates;

The Court doth order that this cause be prosecuted and carried on under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, and for that purpose that the plaintiff's Bill be treated as the plaintiff's statement of claim, and that the defendants be deemed to

have made default in putting in their statement of defence within the meaning of Rule 10 of Order XXIX. of the Supreme Court.

Leave to the plaintiffs to serve notice of motion for judgment abroad, and copy of the order now made, was proposed to be omitted from the present order.

BACON, V.C., made the order as prayed.*

ORDER XIV.

RULES 1 & 3.

(Leave to defend where Writ of Summons specially indorsed. Affidavits of Plaintiff and Defendant.)

COMMON PLEAS DIVISION.

(Before BRETT, GROVE and LINDLEY, JJ.)

DAVIS v. SPENCE.

This was an application to set aside an order of Lush, J., at chambers, made under Order XIV., Rule 1, giving the plaintiff power to sign final judgment on a specially indorsed writ, on the ground that the defendant had no defence to the action. The defendant having answered the affidavit made by the plaintiff on his application for the order, the learned Judge had allowed the plaintiff to make an affidavit in reply.

The plaintiff may reply by affidavit to the defendant's affidavit showing cause in answer to the plaintiff's affidavit that the defendant has no defence to an action on a specially indorsed writ of summons.

Gibbons now argued that the learned Judge had no power to allow the plaintiff to make an affidavit

* W. N., 1876, p. 185; 11 N. C., 123.

in reply. The plaintiff was bound to rely only on his first affidavit. It was, in fact, trying the case on affidavits.

The Court held that the plaintiff was clearly entitled to answer by further affidavit the case set up by the defendant. The obligation to show cause by necessary implication allows the plaintiff to answer the defendant's case. Order XIV., Rule 3, evidently contemplated that the defendant's affidavit was not to be conclusive, for that Rule provided that "the Judge may, if he think fit, order the defendant to attend and be examined on oath, or to produce any books or documents, or copies of or extracts therefrom." The Court refused, therefore, to interfere with the discretion of the learned Judge in giving the plaintiff leave to sign judgment.

Motion refused.*

RULE 4.

(Judgment for Plaintiff as to part of his claim admitted by Defendant.)

COMMON PLEAS DIVISION.

(Before BRETT, LINDLEY and ARCHIBALD, JJ.)

February 12th, 1876.

LORD HANMER v. FLIGHT.

Where a plaintiff has an undoubted right to recover part of his claim in some

This was an appeal from an order made by Archibald, J., at chambers.

The plaintiff is the owner of several small tenements in Church-lane, St. Giles-in-the-

* 1 C. P. D., 719; 25 W. R., 229; 11 N. C., 148.

Fields, which by an indenture dated the 26th of September, 1859, he demised to Patrick Mara for a term of thirty-one years at a yearly rental of £105, payable on the usual quarter days. The plaintiff sued the defendant as assignee of the lease.

The statement of claim was as follows:—

1. The plaintiff is the owner in fee simple and lessor of certain premises in St. Giles-in-the-Fields, being the premises demised in the lease hereinafter mentioned.

2. By indenture dated the 26th September, 1859, the plaintiff (then Sir John Hanmer) demised to Patrick Mara for the term of 31 years, from the 25th December then next ensuing, the following premises. (Then followed a description of the premises.)

3. The rent reserved was £105, payable on the usual quarter days.

4. The said lease contained among others the following covenants material to this case:

(a) A covenant by the lessee to pay the rent at the proper time.

(b) A covenant by the lessee that he, the said lessee, would from time to time pay, or cause to be paid, all costs, charges, and expenses in respect of the said premises for all sewers and drains, and all other works executed under or by virtue of any order or orders of the District Board of Works, or other body having local authority, and all taxes, charges, rates, assessments, and impositions whatsoever, which, during the term thereby granted, should be taxed, charged, assessed, or imposed upon the

form of action, and the writ is specially indorsed, he may at once sign judgment for such part, irrespective of the precise form in which his action is brought. But to entitle him so to sign judgment the facts disclosed in the statement of claim must clearly support the part of his claim, in respect of which he seeks to sign it.

premises thereby granted, or upon any person or persons in respect thereof, and also would, so far as the said premises, or any of them, or any part thereof, should or might be subject to the operation of the Metropolis Local Management Act, the Common Lodging Houses Act, the Nuisances Removal and Diseases Prevention Act, or the bye-laws of the Board of Works for the district in which the said premises, or any of them, are situate, conduct and maintain the same in all respects in conformity with the provisions of the said Acts and bye-laws, and at all times keep the said premises in a cleanly and wholesome state and condition, and cause the same and every of them to be well supplied with pure water during the said term; and from all such taxes, charges, and assessments, impositions, duties, and liabilities, should and would save harmless, and keep indemnified and exempted, the plaintiff, his heirs and assigns; and also should and would during the term thereby granted keep open and use the said tavern . . . for a tavern . . .; and also that he, the said lessee, his executors, &c., would from time to time, and at all times during the continuance of the term thereby granted, when, where, and as often as need or occasion should be or require, at his and their own proper costs and charges, well and substantially repair, &c., and would at the end or other sooner determination of the said term, &c., yield up to the plaintiff, his heirs and assigns, &c.

(c) A covenant to repair and amend within three months after notice.

5. The said indenture contained the following condition for re-entry : (It was in the usual form, and provided for re-entry for non-payment of rent for twenty-one days, and for re-entry for breach of any of the covenants)

6. In or about the year 1870 the defendant took possession of, and, save as hereinafter mentioned, has since occupied the premises. At some time between that date and the grievances hereinafter mentioned, the said indenture and term thereby created was assigned to and vested in him, and the defendant from 1870 till March, 1874, paid rent to the plaintiff according to the terms of the lease.

7. The defendant has been guilty of the following breaches of covenant :

8. Since the 25th March, 1874, no rent has been paid by the defendant or any other person, and the rent from that date is still due and unpaid.

9. The said tenements, so far as they have been subject to the operation of the Metropolis Local Management Act, the Common Lodging House Act, the Nuisances Removal and Diseases Prevention Act, and the bye-laws of the Board of Works for the district in which the premises are situate, have not been maintained and conducted, nor are they now maintained and conducted in conformity with the provisions of the said Acts of Parliament or the said bye-laws ; and the notices and proceedings have been given and taken which are hereinafter mentioned. Nor have the premises been kept at any time, nor are they now in a cleanly and wholesome state, &c.

10. The plaintiff has not been kept harmless or indemnified from costs, charges, and expenses, in respect of the said premises for sewers and drains and other works executed under and by virtue of the orders of the District Board of Works.

11. (Statement of breaches of covenant to repair and keep in repair.)

12. (Statement of breaches of covenant to repair on notice, and averment of notice.)

13. In the year 1874 the said premises were, by reason of the non-observance by the defendant as aforesaid of the above recited covenants, in such a condition as to be unfit for human habitation. The District Board of Works served on the plaintiff notices requiring the demolition of part of the premises, and the repairs therein mentioned to the remainder. The plaintiff thereupon sent to the defendant a notice to repair, with a specification of works to be done, and also copies of the notices served on the plaintiff by the District Board of Works. The defendant has not taken any steps to have the premises repaired in pursuance of the notice, nor to comply with the order of the District Board of Works.

14. The plaintiff insists that the lease has been avoided for the causes of forfeiture aforesaid, and that the plaintiff is now entitled to re-enter.

15. In consequence of the defendant's breaches of covenant as to repair, the said premises are not now, nor can they be, given up to the plaintiff whole, &c.

The plaintiff claims, first, possession of the said premises; secondly, 157*l.* 10*s.* for arrears of rent to the 29th September, 1875, or for use and occupation of the premises; thirdly, 600*l.* damages for the defendant's breaches of covenant above set forth; fourthly, mesne profits from the 29th September, 1875, down to the date of the plaintiff's recovering possession.

The statement of defence was as follows:—

1. The defendant denies that the said indenture and the term thereby created ever were assigned to or vested in him.

2. The defendant denies that he has been guilty of any breach of covenant.

3. The defendant denies that any sewers, drains or other works were executed under the orders of the District Board of Works, save as mentioned in paragraph 4.

4. The works executed under the orders of the District Board of Works were executed in pursuance of notices dated the 31st August, 1875, and orders of about the same date made and given under the Artisans' and Labourers' Dwellings Act, 1868, and at the several times of making the said orders and giving the said notices twenty-one years of the said term did not remain unexpired.

5. The defendant admits that the lease has been avoided, and that the plaintiff is entitled to re-enter. The defendant denies that he was in possession on the 29th September, 1875. He ceased to have possession on the 20th September, 1875.

6. The defendant brings into court 25*l.*, and says that the said sum is enough to satisfy the plaintiff's claim in respect of mesne profits.

The plaintiff took out a summons at chambers to strike out some of the paragraphs in the statement of defence, and also claiming judgment for so much of his claim as related to money due for rent or for use and occupation, upon the ground that the statement of defence was silent as to this part of the claim, and therefore admitted that the defendant had been in possession of the premises from 1870 to September, 1875 (Order XIX., Rule 17).

On the 21st of December, 1875, Master Dodgson amended paragraph 3 of the statement of defence, but refused judgment. On January 26th, 1876, ARCHIBALD, J., varied this order, giving the plaintiff liberty to sign judgment for 15*l.* 10*s.* arrears of rent to September 29th, 1875, and for costs of appeal, and his Lordship also amended paragraph 2 of the statement of defence. On the next day the defendant gave notice of appeal to this Divisional Court.

Beasley, for the defendant, now moved the Court to rescind so much of the order of Archibald, J., as varied the order of Master Dodgson.—This claim is founded on a lease with which the defendant is not concerned. He is not the lessee nor the assignee of the lease. He was for some time, it is true, in possession under the assignee of the lease, but he is not thereby liable under the covenants of the lease. There is no privity of contract between him and the plaintiff. [BRETT, J.—But he was in posses-

sion and for four years paid rent to the plaintiff according to the terms of the lease.] That might be some evidence to support a count for use and occupation, but by the statute 11 Geo. II, c. 19, s. 14, a plaintiff cannot claim for use and occupation when a lease under seal is outstanding. Besides, if the plaintiff were claiming for use and occupation, he must aver that we used the premises by his permission: *Churchward v. Ford*.* And the plaintiff cannot so aver, because, while the lease is outstanding, it is not in his power to give such permission; the holder of the lease for the time being is the only person who can validly give such permission. There never was any contract between the plaintiff and defendant, but only privity of estate, and if the occupation be not under some contract with the defendant, use and occupation will not lie. [BRETT, J.—Even in that case you would have to pay the same sum as mesne profits in an action of trespass or indeed in an ejectment. But here the defendant has paid rent to the plaintiff, and is therefore estopped from now denying that he is his landlord.] But this is throughout an action on the covenants contained in the indenture of lease. We deny that we are assignee of the lease, or liable under its covenants. It is only at the end, in the particulars of his claim, that the plaintiff inserts the words:—"or for use and occupation." It is very unfair to insinuate a separate cause of action by claiming it thus in the alternative at the end of a long statement. Order XIX.,

* 2 H. & N., 446; 26 L. J. (Ex.), 354; 5 W. R., 831.

Rule 9, requires the plaintiff to state each distinct claim separately and distinctly. If we had understood that this short sentence included a claim for use and occupation as well as a distinct claim for rent due under the covenant in the lease, we should have demurred to it.

Bowen, in support of the order, was not called upon.

BRETT, J.—This is one of the cases which show the value of the reforms introduced by the Supreme Court of Judicature Acts. Formerly, a man who had a substantial right to be paid a sum of money could not recover it till he had determined upon a particular form of action, and had established that the circumstances justified an action in that form. But now when a man clearly has an undoubted right to recover the money in some form of action or other, he may at once sign judgment for the amount without staying to determine the precise legal relation on which he stands to the defendant. Objection has been taken to the statement of claim in this case on the ground that it does not disclose in what precise form of action the plaintiff wishes to recover his rent. But it need not do so. Pleadings are now to be merely concise statements of the facts which the party pleading deems material to his case. This statement contains allegations of all the facts that the plaintiff deemed necessary to establish his legal rights, but it does not state, and it need not state, what form his legal rights take. That is an inference of law to be drawn by the Court from the facts averred on either side. Alle-

gations of fact are made in this statement of claim, and some are denied, and some are not. Those that are not denied are taken as being admitted.

In the present case it is not denied by the defendant that he had possession of these premises, and that he paid rent for them at the rate of £105 a year (which is the amount reserved by the lease) up to Ladyday, 1874, and that he continued in possession till September, 1875, but that between Ladyday, 1874, and September, 1875, he has paid no rent. Surely then Order XIV., Rule 4, is applicable to this case. It is clear that payment is due for the occupation of the premises for the period between Ladyday, 1874, and September, 1875. Judgment therefore can be signed at once for the eighteen months' rent. The defendant cannot now turn round and say to the plaintiff, after having paid him rent, "I am no tenant of yours." It is not necessary now to inquire into the precise legal relation in which the defendant stands to Mara, or to the plaintiff; when the question comes on for trial as to the want of repair, and as to the breaches of the other covenants of the lease, it may be necessary to do so. It is enough for us to see that the plaintiff is entitled to payment from the defendant for the occupation during the period in question, and seeing, as we do, that he is so entitled, we confirm the order of my brother Archibald.

ARCHIBALD and LINDLEY, JJ., concurred.

Motion dismissed with costs.*

* 35 L.T., 127; 24 W.R., 346.

COURT OF APPEAL.

(Before JESSEL, M.R., KELLY, C.B., MELLISH, L.J., and
POLLOCK, B.)

(*May 11th*, 1876.)

LORD HANMER *v.* FLIGHT.

This was an appeal from the decision of the
Common Pleas Division.

Beasley for the Appellant.

Bowen for the Respondent.

The COURT were unanimously of opinion
that *the facts* disclosed in the statement of
claim did not support the claim for use and
occupation, and that the plaintiff was not there-
fore entitled to sign judgment for the £157
arrears of rent, in respect of such use and occu-
pation, under Order XIV., Rule 4.

Judgment below reversed.*

* 36 L. T., 279.

RULE 6.

(Leave to defend may be given unconditionally or subject to terms as to Security or otherwise.)

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

(Before COCKBURN, C.J., ARCHIBALD, J., and POLLOCK, B.)

March 6th, 1876.

RUNNACLES v. MESQUITA.

This was an appeal against an order made by DENMAN, J., at chambers, under Order XIV., Rule 6, affirming an order of the Master requiring the defendant to pay into Court the sum of £28. 8s. 9d. as a condition of his being allowed to defend the action. The writ was specially indorsed under Order III., Rule 6, with a claim for £28. 8s. 9d., as the balance due to the plaintiff, a builder, by the defendant for work done and materials provided. The plaintiff applied under Order XIV., Rule 1, for leave to sign final judgment for the amount indorsed on the writ, with costs, on the ground that the defendant had no defence to the action. In support of his application, the plaintiff made use of the following affidavit:—

Where the writ is specially indorsed and the defendant in his affidavit shows what the grounds of his defence are, and gives reasons from which the Court may fairly conclude that his defence is a substantial one, the defendant ought not to be required to bring money into Court under Order XIV., Rule 6, as a condition of his being allowed to defend.

“1. I am a builder. I was, in or about November last, instructed by the defendant to make some alterations, and build a shop, and do several other things at the defendant's place, 5, St. Mark's Place, Goodman's Fields.

“2. No contract as to price was entered into, the only arrangement being, I was to draw part

on account as the work proceeded, and when the whole was finished, send in my bill, which the defendant promised he would then pay.

"3. I accordingly did the work, defendant paying me on account £98. 11s. 3d., being about 75 per cent. on the whole amount, which is customary in my trade.

"4. Towards the end of January, when the work was finished, I was with defendant on the premises, and asked him when it would be convenient for him to receive my account, and he asked me to send him in my bill, which I promised to do, adding that, if he would like it, I was willing for any respectable surveyor to survey and value the work, and accept his valuation as binding on both parties. Defendant said he did not want that, but, if I sent in my bill, he was ready to settle, or words to that effect.

"5. I, accordingly, sent in my bill, as requested by the defendant.

"6. All the items in the said bill are fair and reasonable charges, and all the work charged for in the bill has been done by me, or by my direction.

"7. For my own satisfaction I asked a friend of mine to recommend me a respectable and competent man who could survey and measure up the work in question.

"8. A Mr. Allard, of King's Cross, surveyor and builder, was recommended to me.

"9. The said Mr. Allard has gone over the work and measured it up, and valued it at £135. 13s., or thereabouts.

"10. To the best of my knowledge and belief

the defendant has no grounds of defence to this action on the merits."

The defendant, in showing cause, made use of an affidavit in reply, which was as follows:—

"1. I have read the plaintiff's affidavit in support of an application for leave to sign judgment in this action pursuant to Order XIV., Rule 1.

"2. In answer to paragraph 2 of such affidavit, I say that it is true that no contract as to price was entered into between myself and the plaintiff, with the exception, however, that the plaintiff guaranteed that the total price for such alterations should not exceed £40. I deny, however, that I agreed, as stated in such paragraph, to pay the plaintiff any sums on account, although I did subsequently pay him sums in respect of such work, amounting to £98. 11s. 3d.

"3. Pending the progress of such alterations I frequently remonstrated with the plaintiff upon the additional expense he was putting me to, and required to know when they would be completed.

"4. The account, as sent by the plaintiff to me, is most excessive and unreasonable, and I say that the amount already paid by me is greatly in excess of the amount the plaintiff is entitled to receive for such work, the same being very badly done; so much so, that an outside wall, built by the plaintiff, will, as I am advised, have to be pulled down and rebuilt.

"5. I am advised and believe I have a good defence to this action on the merits, and it is

my intention to forthwith instruct a surveyor to survey such work for the purpose of giving evidence on my behalf on the trial of this action."

The Master, and on appeal, the learned Judge, made the orders above mentioned. .

E. Pollock now moved the Court to rescind so much of the order of Denman, J., as required the money to be paid into Court.—This is not a case in which the *onus* of proof ought to rest upon the defendant. He has shown that he has reasonable grounds for defending the action, and ought to be allowed to defend it on equal terms, and not to be put to the disadvantage of having to pay money into Court. The action ought not to be tried at chambers; all the Judge has to do is to see that the defendant has a *bonâ fide* defence.

Bucknill, for the plaintiff.—A mere affidavit of defence is not sufficient. Both Mr. Justice Quain* and Mr. Justice Archibald have laid down this maxim at chambers, but at the same time they have said that it is difficult to lay down a rule as to how far the Judge at chambers should go into the merits of the case. [COCKBURN, C.J.—As soon as he finds that there is a *bonâ fide* contest the Judge should refuse to hear the case further.] Here there is no *bonâ fide* contest. The facts are not in dispute. The defendant has not denied that the work has been done, nor that he has promised to pay for it. [COCKBURN, C.J.—But it would be most

* See 1 Charley's Cases (Chambers), 58.

unfair to prevent him from disputing the amount.] Just so, and that is why the learned Judge at chambers allowed the defendant to defend the action on the terms of paying the money into Court. The plaintiff has refused a reference, which would be the right way to settle the amount if there was a real dispute. [COCKBURN, C.J.—The plaintiff has a right to say, “I prefer to go to a jury.”] But then the Judge has a discretion under Rule 6, which the Court will be slow to disturb. He may take into consideration all the circumstances of the case: see *Villeboisnet v. Tobin*,* *Tomlinson v. Goatby*.†

COCKBURN, C.J.—We agree in thinking that the order of Mr. Justice Denman carried the provisions of Order XIV. too far. We are very unwilling to interfere in a matter which is within the discretion of a Judge at chambers, but this is a question arising at the commencement of a new system by which infringements are made on the Common Law rights of defendants; and in such a case we ought not to hesitate, where we think a discretion has been wrongly exercised, to point out what we consider to be the limits within which that discretion is to be exercised. The affidavit of the defendant in the case goes beyond the mere form of alleging that there is a defence to the action. It goes on to state what that defence is, and I am of opinion that, where the defen-

* L. R., 4 C.P., 184; 38 L. J. (C.P.), 148.

† L. R., 1 C.P., 230.

dant points out what his defence is, and that defence is *primâ facie* a substantial one, the Judge at chambers ought not to refuse the defendant leave to defend nor to put him under the terms of bringing the money claimed into Court. Here the defence is that the sum claimed is excessive, that the work is badly done, and that the defendant has already paid more than the plaintiff has a right to claim. That is an actual and substantial defence, and one which the defendant has a right to lay before a jury—or an arbitrator. It is not competent for a Judge to decide the matter at chambers.

ARCHIBALD, J., and POLLOCK, B., concurred.
Order rescinded.*

EXCHEQUER DIVISION.

(Before BRAMWELL and CLEASBY, BB.)

May 10th, 1876.

LLOYD'S BANKING COMPANY, LIMITED, *v.* OGLE.

In an action against a surety upon a writ specially indorsed, where the plaintiff does not show that the principal debtor has acknowledged the debt, and no particulars of demand have been given to the defendant, and no opportunity has been afforded him of

This was a motion by the defendant, by way of appeal, to rescind or vary an order of POLLOCK, B. at chambers, dated the 3rd May, 1876, dismissing with costs a summons on appeal to rescind an order of Master Johnson, dated the 28th April, 1876, giving the plaintiffs liberty to sign final judgment for the amount indorsed on the writ of summons and interest, if any, and costs to be taxed, unless money were paid into Court or security given for the amount to the satisfaction of the Master.

* 1 Q. B. D., 416; 45 L. J. (Q.B.), 407; 24 W. R., 553.

The writ was specially indorsed as follows: *verifying the debt and ascertaining that it is due, the defendant, though he has made no application for particulars, may, upon an affidavit that he believes that nothing is due, be admitted to defend without being required to pay money into Court or give security, under Order XIV., Rule 6.*

"The plaintiff's claim is for £6,000, and interest under a continuing guarantee not to exceed £6,000, and interest thereon at £5 per cent. per annum, for the banking account of the Hockley Hall Collieries, Limited, with the plaintiffs."

The plaintiffs made an application on summons before the Master, calling on the defendant, under Order XIV., Rule 1, to show cause why the plaintiffs should not be at liberty to sign final judgment. In support of that application an affidavit, sworn by the secretary and general manager of the plaintiff company on the 7th April, 1876, was filed, in which the deponent stated that the cause of action arose under a continuing guarantee, in writing, of the defendant and others, dated 13th March, 1874, whereby the defendant and others jointly and severally guaranteed the banking account of the Hockley Hall Collieries, Limited, with a branch bank of the plaintiff company not exceeding the £6,000, and interest thereon at £5 per cent. from the date of the said guarantee. That the £6,000 so payable upon the said guarantee still remained due from the defendant to the plaintiff company, the Hockley Hall Collieries, Limited, being in default of payment of the balance due from them to the plaintiff company upon the said banking account, together with interest; and that in the deponent's belief the defendant had no defence to the action.

The defendant, in an affidavit in reply, sworn on the 22nd April, 1876, stated that he had read the before-named affidavit of the plaintiffs,

and that the defendant was formerly a director of the Hockley Hall Collieries, Limited, but resigned office on the 14th May, 1874; that during the time he was such director, he, together with his co-directors, signed some memorandum of guarantee or instrument, a copy of which he did not at the time retain; that since he resigned the office of director he had no knowledge whatever of the dealings and transactions of the Hockley Hall Collieries, Limited, with the plaintiff company, but he had recently ascertained from the secretary of the Hockley Hall Collieries, Limited, that their dealings with the plaintiff company had been continued up to a very recent period prior to the commencement of this action, the writ in which was issued on the 22nd March, 1876; that very considerable sums of money, amounting to thousands of pounds, had been paid by the said collieries company to the plaintiff company, and that the plaintiff company had received from the said collieries company, who were the principal debtors, in respect of their alleged claim, and now held, the muniments of title relating to certain freehold land of the value of £3,000 and upwards, and that they also held the security of the muniments of title relating to certain mineral leasehold property belonging to the said Hockley Hall Collieries; that the said guarantee was also signed by certain gentlemen who were at the time, and have since continued to be, and are still directors of the Hockley Hall Collieries; that all the dealings and transactions which had taken place between the Hock

ley Hall Collieries Company and the plaintiff company since the date at which defendant retired from the direction, had been conducted by and were well known to such directors, but the defendant had no knowledge of them, nor did he have any control or dealings in reference thereto; that in the absence of any information upon the subject, the defendant was unable to ascertain whether anything was due to the plaintiff company by virtue of the said guarantee, and he verily believed, having regard to the statement indorsed upon the writ in the action, and the statement contained in the affidavit of the secretary and manager of the plaintiff company, that nothing whatever was due in respect thereof; that he had been informed and believed that the plaintiff company had received from the Hockley Hall Collieries a further guarantee in reference to their said banking account, the particulars of which were unknown to the defendant; *that he had never received from the plaintiff company any statement of accounts showing the particulars of their claim* against the Hockley Hall Collieries, Limited, and of their alleged claim against the defendant under the said guarantee.

In reply to the defendant's affidavit, the secretary and general manager of the plaintiff company made a further affidavit, sworn on the 26th April, 1876, in which he stated that he had read the defendant's affidavit, and that the said memorandum of guarantee was a joint and several continuing guarantee in respect of the banking account of the Hockley Hall Collieries,

Limited, kept by them with the branch bank of the plaintiff company, and such guarantee was signed by, amongst others, the defendant, and was wholly irrespective of his being or ceasing to be a director of the Hockley Hall Collieries, or of his being concerned in or informed of the operations of such company, and was by its express terms unaffected by any other guarantee or collateral security held by the plaintiff company, or to which they were entitled in respect of the said banking account, and that the said continuing guarantee was now in full force, and had in no way been determined. That there was still due from the Hockley Hall Collieries, Limited, upon the banking account, even after allowing for the full value of the fees mentioned in the defendant's affidavit, a sum of money largely in excess of the amount, claimed in this action.

Upon these affidavits the Master and POLLOCK, B., made the orders already mentioned. The defendant appealed.

J. Brown, Q.C. (Trevelyan with him), for the defendant, in support of the motion.—The defendant was a surety merely, and not the original debtor, and to such a case Order XIV., Rule 1, was not intended to apply. The defendant was ignorant whether or not the claim made upon him by the plaintiff company was well founded or not, or whether anything had or had not occurred to alter his position and liability, and the plaintiffs, within whose knowledge the state of the accounts and the circumstances of the case were, had given him no information

on the subject. The object of the defendant was inquiry into, and proof of the existence and validity of the claim against him, and not mere delay. The plaintiff company, however, have the security of the other guarantors.

H. Matthews, Q.C. (with him *Archibald*), for the plaintiff company.—This is purely a matter of discretion, and that discretion having been exercised, not only by the Master, but subsequently by the learned Judge, in confirmation of the Master, the Court will be very slow to interfere, at all events they will require strong cause to be shown for their doing so.

In *Golding v. The Wharton Railway and Ricer Salt Company*,* and *Runnacles v. Mesquita*,† the Court rescinded the order, no doubt, and the defendant was let in to defend without terms, but in that case he showed good grounds of defence. In the present case, on the contrary there is not a vestige of a defence set out in the defendant's affidavit. Moreover, had he been, as he states, ignorant of the debt or the state of the account, he might, during the month's interval between the issuing of the writ and the date of the order, have asked for and obtained full information, but that he has not done. It is submitted that he has, and has shown that he has, no substantial defence to the action.

J. Brown, Q.C., in reply.—The defendant is only asking to be let in for the purpose of in-

* 1 Q. B. D., 374; 34 L. T., 474; 24 W.R., 423.

† Reported, *supra*, p. 248.

quiring into the account. To impose upon the defendant the burden of giving security for this large amount would be to deprive him practically of the right and opportunity of investigation to which, as a surety, he is entitled.

BRAMWELL, B.—In this case I am of opinion that the rule should be made absolute. I do not know that I should have had sufficient confidence in my own opinion to reverse the decision not only of the Master, but of my brother Pollock, at chambers, in this matter, had I not had an opportunity, during the short adjournment of the Court, of consulting Lord Chief Justice Coleridge, and three of the other learned Judges of the Common Pleas. So far as one can say what a Judge would or would not do under circumstances which do not now exist, if this matter had come before me in the first instance I should not have made this order. It seems to me that the right to sign judgment was intended to apply only to such cases as, almost upon the admission of the defendant, are undefended, and where a plea, if put in, could be for the purpose of delay only; and that it was not intended to apply to cases where the defendant might reasonably say, "I do not know whether your (the plaintiff's) case is a well founded one or not, and I require you to prove it against me." I by no means say that in no case of an action against a guarantor should such an order as this be made, because it may well be that a plaintiff might swear that he had sent in particulars of his claim under the guarantee to the defendant, that he had invited inquiry by the

defendant into the matter, and proof of it, and that the defendant had said, "I require no such information, for I am satisfied that it is a well founded claim." Under such circumstances it might well be that a defendant could only put in a plea for the dishonest purpose of delaying his admitted creditor, and under such circumstances an order like the present might well be made. If the plaintiffs in this action had sworn that the debt was admitted by the collieries company, and that the defendant had informed himself of that, and had not dissented from it in any way, or if, without specifying particulars, it had in any way appeared that the defendant knew that the debt was due, it would seem to me that the defendant was only defending the action in order to delay the creditors, and I think an order of this kind might be made; but, where all that appears is that an action is brought on the guarantee, and the guarantor, as there is no reason to doubt is the case here, *bonâ fide* and honestly says, "I do not admit that this debt is due, and require it to be proved," it seems to me that Order XIV. was never intended to take the right to defend from him, and to allow the case to be proved against him by the simple oath of the creditor, or the person guaranteed, claiming the money as due. But it may be said that the right is not taken from him, because he may bring the money into Court, or give security for it; but those are conditions that in many cases would absolutely deprive the defendant of his right to defend; and which ought only to

apply where there is something suspicious about the defendant's mode of presenting his case. In the present case, moreover, the debt is secured to the plaintiffs by five other persons who are co-guarantors with the defendant. On the one hand, the plaintiffs have not shown that they ever gave the defendant any particulars, or that the debt is acknowledged by the collieries company; while, on the other hand, the defendant has not shown that he ever made any application to the plaintiffs for particulars, or that he ever attempted to ascertain whether the collieries company were or were not satisfied with or admitted the existence of the debt. I do not think that there is anything in the particular circumstances of this case which should take the defendant out of what I think is or ought to be the general rule in the case of an action against a guarantor, that where there is no acknowledgment of the debt by the defendant, or anything else to make it appear that a defence on his part is for the purpose of mere delay, he ought to be permitted to defend without terms as to giving security, and to require that the case shall be proved against him. I think therefore that in this particular case an order admitting the defendant to defend without giving security for costs should be made. The case is analogous to that of a defendant, under Sir Henry Keating's Act, applying for leave to defend in an action on a bill of exchange which he had, in fact, given as a guarantee, in which case he would have been admitted to defend.

CLEASBY, B. — My own impression would have been that if a man induces bankers to advance money by giving a guarantee to the extent of £6,000, and then, in an action on the guarantee, upon an affidavit of the bankers, the banking account shows that a balance to that amount is due, he ought, if he sets up no defence except his ignorance that the sum is due, to be prepared to give security. I think it would be very inconvenient that there should in such cases be a different practice pursued by different Judges at chambers. I am influenced, however, by the consideration that we are not so much setting aside, as it were, the exercise of a discretion both on the part of the Master and of a learned Judge, but only taking a different view from them of the construction of a particular Rule of Court as applied to a case like the present. That being so, I do not wish to differ on the present occasion from the opinion of my brother Bramwell, corroborated, as it has been, by the Lord Chief Justice and other Judges of the Common Pleas.

Order rescinded.*

* 1 Ex. D., 262; 45 L. J. (Ex.), 606; 34 L. T., 584; 24 W. R., 678.

ORDER XV.

RULES 1 & 2.

(Order for an Account, where Writ has been indorsed under Order III., Rule 8.)

EXCHEQUER DIVISION.

(Before BRAMWELL, AMPHLETT, and HUDDLESTON, BB.)

Jan. 20th, 1876.

PIKE v. FRANK KEENE AND BYNE.

An order for an account under Order XV., Rule 1, cannot be enforced by an attachment under Order XXXI., Rule 20. Neither can an order for a "statement of the names of co-partners," under Order XVI., Rule 10, be so enforced.

THIS was an application on the part of the plaintiff for an attachment under Order XXXI., Rule 20, against the defendant Frank Keene, for disobedience to two Judge's orders. On the 15th of December, 1875, an order was made by HUDDLESTON, B., on the application of the plaintiff at chambers, under Order XVI., Rule 10, directing that the defendant Frank Keene, who was the only defendant who had appeared, should deliver to the plaintiff within one week a statement in writing, verified by affidavit, of the names, &c., of the persons who were, in the previous month of September, partners with such defendant, in the firm of Frank Keene and Byne.

A summons was subsequently taken out under Order XV., Rules 1 & 2, and a Judge's order was made on the 23rd of December, 1875, by consent, that the defendant, Frank Keene, should within ten days file a detailed account, verified by affidavit, of all the moneys received by him for the sale of certain goods entrusted to him by the plaintiff for sale. It was sworn by the plaintiff in the affidavit made by him in support of the present motion, that the

Judge's orders had been duly served on the solicitor of the defendant, Frank Keene, but that neither of such orders had been complied with.

Morton, for the plaintiff, now moved under Order XXXI., Rule 20, for an attachment against the defendant, Frank Keene, for disobedience to the Judge's orders. He submitted that the defendant by his disobedience to the orders in question had brought himself within the penalties of Order XXXI., Rule 20, for disobedience to orders for discovery or inspection.

The Court, being of opinion that neither of the Judge's orders was an order for "discovery" or "inspection" within the meaning of Order XXXI., Rule 20, refused to grant the plaintiff's application for an attachment.

Application refused.*

ORDER XVI.

RULE 2.

(Substitution of new Plaintiff where the action has been commenced in the name of the wrong person as Plaintiff.)

CHANCERY DIVISION.

(Before SIR CHARLES HALL, V.C.)

May 18th, 1876.

TILDESLEY v. HARPER.

Maclean, for the plaintiff in this action, which was one to set aside certain mortgages, and for *An order under Order XVI., Rule 2,*

* 35 L. T., 341; 24 W. R., 322; W. N., 1876, p. 36. See also Order XVI., Rule 10, and Order XXXI., Rule 20.

cannot be made
ex parte. The
Court declined
before the
hearing in a
Chancery suit
to substitute
infant cestuis
que trustent
as plaintiffs
for their
trustee, but
joined them
with him as
co-plaintiffs
until the
hearing.

other relief, moved *ex parte* under Order XVI., Rule 2, for an order to strike out the plaintiff (who was a trustee) as plaintiff, to substitute three infant *cestuis que trustent* as plaintiffs instead of him, and to make the plaintiff a defendant.

The VICE-CHANCELLOR said that the three infant *cestuis que trustent* might be joined as plaintiffs by a next friend, and then if there were any misjoinder he would at the hearing order the plaintiff trustee to be treated as a defendant. He could not alter the parties to an action on an *ex parte* application, but the plaintiff might give the defendants notice that an order had been made in these terms, and require them to state whether they objected to the order or required notice stating that the Court considered they ought to have been served. Then, if they did not object, the order would be drawn up as having been made upon motion, while, if they required to be served with notice, the Court, on the further application, would deal with the costs, which otherwise would be costs in the cause.*

RULE 3.

(Joinder as Defendants of persons against whom any relief is alleged to exist, whether jointly, severally, or in the alternative.)

See the case of *EDWARDS v. LOWTHER*, reported under Rule 13 of this Order, *infra*.

RULE 4.

(It shall not be necessary that every Defendant shall be interested as to all the relief prayed for or as to every cause of action.)

CHANCERY DIVISION.

(Before Sir JAMES BACON, V.C.)

June 17, 1876.

COX v. BARKER: BARKER v. COX.

1. COX v. BARKER.

This action was commenced on the 28th of April, 1876, by Mrs. Isabella Cox, the widow and executrix of William Sands Cox, deceased, against William Barker, and also against the trustees of the marriage settlement of the plaintiff, the devisees in trust of the testator, his other personal representatives, one Thomas Cox, and the Attorney General (in respect of certain charities). The statement of claim was as follows:—By the settlement, dated the 25th August, 1866, made upon the marriage of the plaintiff and the testator, two freehold houses in Paradise Street, Birmingham, were conveyed to William Hatton, and Osborne Reynolds, as trustees, to such uses as Mr. and Mrs. Cox should appoint, and, in default of appointment, to the use of the trustees during the life of the plaintiff, in trust to pay the rents to her for her separate use without power of anticipation, with remainder to the use of the testator in fee. The testator, by his will, dated the 3rd of February, 1875, bequeathed the residue of his personal estate to Davie, Hickman, Osborne Reynolds the younger,

A Statement of Claim is not open to demurrer on the ground merely, that the defendant demurring is not interested in all the questions raised by it.

Lloyd, Goodman, and Woody, upon trust to convert and pay thereout legacies of £500 to each of the children of Thomas Cox, and to invest the residue and pay the income of the investments to the plaintiff, during her life, for her separate use, and after her death, to pay the residuary personal estate to certain charities; and, after reciting his marriage settlement, the testator devised all the real estate of which he should be seised at his death, or over which he had any power of appointment, to the above-named six trustees, in trust to pay the annual income to the plaintiff, during her life for her separate use, and after her death upon trust to sell the same, and to stand possessed of the proceeds in trust for such of the grandchildren of Thomas Cox, as should be living at the death of the plaintiff. The testator appointed the plaintiff executrix, and the six trustees executors of his will.

In September, 1875, the defendant, William Barker, entered into negotiations with the testator for the purchase of the two houses in Paradise Street, Birmingham, and the price agreed upon was the sum which, invested in Consols, would produce an income of £180 per annum (£6,000 Consols). The circumstances of the case were fully explained to the trustees of the settlement, and a contract for purchase was entered into between the testator and Barker on the 25th of October, 1875, which stated that the premises "are now settled to such uses as the vendor and Isabella Cox, his wife, shall jointly appoint, and the vendor will procure a

proper assurance of the premises to the purchaser, to be executed by all necessary parties.” An abstract of the vendor’s title, including the marriage settlement, was sent to the purchaser’s solicitor, and, pending the completion of the purchase, some correspondence took place on the subject of the investment and proposed settlement of the purchase-money. On the 22nd of December, 1875, £6,000 Consols were purchased by Barker in the names of Hatton and Osborne Reynolds, the trustees of the settlement, in pursuance of the agreement for sale, and a deposit which had previously been paid by Barker was thereupon returned to him. On the 23rd of December, 1875, on which day the conveyance was sent by the purchaser’s solicitor for execution by the testator and the plaintiff, the testator died suddenly without having executed it. The conveyance was, in form, an appointment by the testator and the plaintiff, under the power contained in their marriage settlement, without any conveyance by the testator and the plaintiff, or by Hatton and Osborne Reynolds, of their respective estates or interests in default of appointment. The draft of the conveyance had been previously approved by the solicitors acting for the plaintiff, but without her express instructions for this purpose. The plaintiff, in conversation with the testator and William Hatton, pending the negotiations already referred to, said she thought it a pity to disturb the position of the trust property, but did not either agree or refuse to concur in the sale. She was not informed and was not

aware that her consent was required to the sale. Being advised, after the testator's death, that it lay with herself and the trustees of the settlement to complete, or not to complete, the sale to Barker, but that, if the sale were so completed, the real property might, for the purposes of the testator's will, be treated as converted into personal estate during his lifetime, and its destination under the will diverted from the grandchildren of Thomas Cox to the residuary charitable legatees, and believing that the testator had not present to his mind in contracting for the sale that the effect would be to vary the dispositions made by his will, the plaintiff declined to concur in or be a party to complete the sale. At the death of the testator the plaintiff and the defendant, Thomas Cox, were his only next of kin. The will was proved by the plaintiff, and by Davie, Hickman, and Osborne Reynolds the younger alone. All the six trustees except Woody, who disclaimed in March, 1876, accepted the trusts of the will. In an action brought by the plaintiff on the 25th of February, 1876, against Davie, Hickman, Reynolds the younger, Lloyd, Goodman, and Woody, for the administration of the real and personal estate of the testator, Rotten was appointed a trustee of the will in the place of Woody.

The plaintiff desired to have the following questions determined by the Court :—

1. Whether, as between the defendant Barker and the real representatives of the testator, the contract of the 25th of October, 1875, was

binding on the defendant and such representatives respectively, or whether such contract was or not conditional on the plaintiff's consenting to and actually concurring in the execution of the joint power of appointment vested in the testator and her, and what was the true construction of the contract as between the said parties.

2. Whether Barker was entitled, if he should so claim, to have the intended purchase completed by the trustees of the settlement as to the ultimate remainder only in the property, with a compensation out of the purchase-money for the life interest of the plaintiff therein.

3. Related to the destination of the purchase-money if the contract were valid.

4. Whether, if the contract was not valid and binding as between all the above-mentioned persons, and was not completed in the testator's lifetime, it did or did not operate to convert the testator's ultimate remainder in the property comprised in it from real to personal estate for the purposes of his will, and as between his real and personal representatives.

5. If so converted, whether such property or the £6,000 Consols was of the nature of pure personalty, or of personalty savouring of the realty, for the purposes of the residuary bequest of personal estate contained in the will.

6. Whether the plaintiff could be compelled to concur in any conveyance of the property to the defendant Barker.

7. Whether, if not so compellable, her concurrence in any such conveyance would alter

the ultimate destination of the testator's interest in the property under the dispositions contained in his will.

8. Whether any trusts of the proceeds of the sale, or of the testator's interest in the same, were validly declared by the testator in his lifetime.

9. Related to costs.

The plaintiff claimed that these questions might be determined by the Court as between the several parties thereto.

The defendant Barker demurred to the whole of the statement of claim, "on the ground that the facts therein alleged did not show any cause of action to which effect" could "be given by the Court against him, and, on other grounds, sufficient in law to sustain" that demurrer.

2. BARKER *v.* COX.

This was an action commenced on the 27th of April, 1876, by Barker against Mrs. Cox, Davie, Hickman, Osborne Reynolds (the younger), Lloyd, Goodman, Rotten, Hatton, and Osborne Reynolds, claiming specific performance of the contract of the 25th of October, 1876, by a conveyance to the plaintiff of the fee simple, subject to Mrs. Cox's life interest, with compensation to the plaintiff out of the testator's personal estate in respect of such life interest, a lien upon the £6,000 Consols for the amount of compensation, and the injunction to restrain the trustees of the settlement from transferring or disposing of the Consols, except under the direction of the Court.

To the statement of claim in this action two demurrers were put in.

1. A demurrer and disclaimer by the trustees of the real estate devised by the will, on the ground that the contract disclosed to the plaintiff that the testator was not entitled to dispose of the property as owner, and that the contract was not binding on them; and they disclaimed any interest in the sum of £6,000 paid over to the trustees of the settlement in respect of the purchase-money.

2. A demurrer by the personal representatives of the testator, admitting, for the purpose of the action (but not further), that the purchaser was entitled to the specific performance of the contract claimed by him, but demurring to the claim for compensation out of the testator's life interest, or to any lien by the plaintiff on the £6,000 Consols, on the ground that it was by the contract disclosed to the plaintiff that the testator was not entitled to sell as owner. They also claimed the £6,000 Consols as part of the testator's personal estate.

In *Cox v. BARKER*, *Sir H. Jackson, Q.C.*, and *Chapman Barber*, argued in support of Barker's demurrer.

Kay, Q.C., and *Russell Roberts*, for the plaintiff, cited Order XVI., Rule 4; Order XXXVI., Rule 6; and 15 & 16 Vict., c. 86, s. 50.

In *BARKER v. Cox*, *Kay, Q.C.*, and *Woodroffe*, argued in support of the demurrer and disclaimer of the trustees of the testator's real

estate; *Russell Roberts* for the demurrer of the personal representatives of the testator.

Sir H. Jackson, Q.C., and *Chapman Barber*, for the plaintiff *Barker*.

BACON, V.C.: The demurrer in *Cox v. Barker* is by far the most important, as it is founded on what must be admitted to be quite a new rule of this Court. Now, I take it that it was the intention of the Legislature, when any question of any sort, or any set of questions arose, to endeavour by one hearing and one decree to dispose of all the matters in litigation between all the parties who were interested in the subject of the litigation. That object seems to have been in the mind of *Mrs. Cox* when she filed her statement of claim. The statement of claim is remarkably fair and full, and contains no allegation that anybody can, with any reason, object to. It states clearly and explicitly the sort of entangled condition into which the subject of this contract had fallen, and the embarrassing position of the administration of the testator's estate. If there is anything to be ascribed to the provisions of the Supreme Court of Judicature Acts other than what I have mentioned, I am at a loss to discover it; and such being the meaning of the Legislature, it is the bounden duty of every Court to give full effect to that meaning. The new Acts, at the same time that they have enabled any person stating a claim to bring before the Court all persons interested in that claim, and to include in the claim every question that can belong to it, or arise out of it,

have at the same time carefully provided that no one shall be prejudiced by the fact of his being joined. Order XVI., Rule 4, is distinct on the subject. Now, the first demurrer is that of Mr. Barker, who says he is called upon to be a party to a litigation in the greater portion of which he has no kind of interest, that many of the questions raised do not concern him, and that he cannot be affected by their result in any way. The very thing which, in my opinion, the Legislature meant to accomplish was to deal with cases in which there were many persons interested, and many interests involved, and to give the Court power once for all to dispose of those cases, and to dispose of all the interests of many parties. I think Mr. Barker has no reason to complain. He has full liberty in his answer to bring forward every right that he can assign, and to bring it forward with no greater risk of failure of justice than would reasonably happen if he were the sole party to the action. It cannot be disputed that the Act (15 & 16 Vict., c. 86, s. 50), which enables the Court to pronounce declarations, is in its full vigour. Whether any relief is to be founded on Mrs. Cox's claim, will depend on the decision of the several questions which she has raised in her statement of claim. I cannot myself perceive that when the Court comes to decide any one of these questions, it will leave it with only the expression of an opinion. The Court will not necessarily stop with a mere declaration, but will, as I should expect and believe, give directions in the shape of a decree necessary to

carry into effect the opinions which the Court may have expressed. If, in the opinion of the Court, the plaintiff is compellable to concur in any conveyance to Barker, then there must be a direction that she do convey; if she is not compellable, the answer to the question will be conclusive. I do not adopt the view that the provisions of the statutes, which enable the statement of such a claim as this to be made, and the judgment of the Court to be taken on it, mean that the Court is to express an opinion only, and go no further; and I cannot see that Mr. Barker, in the face of these Acts of Parliament, has any right to complain of the statement of claim delivered by Mrs. Cox. I see no harm in permitting Mrs. Cox's claim to go on in its regular course, and no reason why Mr. Barker, although he is nominally associated with other defendants, should not proceed to state his defence, and his title to relief, because title to relief, as well as defence, are included in the questions raised at the end of Mrs. Cox's claim. I think, therefore, that his demurrer cannot be allowed. I overrule it without costs.

With respect to the two demurrers in *Barker v. Cox*, I shall neither allow nor overrule them, but save the benefit of them until the hearing of the action, when, if Mr. Barker's action come to a hearing, these demurrers can be argued. The costs will be reserved.*

* 3 Ch. D., 359; 35 L. T., 685; 11 N. C., 142.

COURT OF APPEAL.

(Before JAMES, MELLISH AND BAGGALLAY, L.JJ.)

July 19th and 22nd, 1876.

COX v. BARKER.

BARKER v. COX.

1.—COX v. BARKER.

The defendant Barker appealed from the over-ruling of his demurrer.

Sir H. Jackson, Q.C., and *Chapman Barber*, for the appellant, contended that the statement of claim was demurrable, as it sought for no relief, but only to obtain a mere abstract expression of opinion upon matters affecting in certain events the rights and interests of persons interested under the will. Although joined as a defendant with these persons, Barker had no interest whatever in these questions, while, as to the only question in which he was interested, namely, the validity of the contract of October, 1875, the plaintiff, by her statement of claim, neither repudiated it nor sought specific performance of it. The Act 15 & 16 Vict., c. 50, did not enable a Bill to be filed for the purpose of obtaining a mere declaration of right on which consequential relief was neither asked for nor could be obtained. They referred to *Rooke v. Lord Kensington*,* *Jackson v. Turnley*,† *Bristow v. Whitmore*‡ and *Harry v. Davey*.§

Kay, Q.C. and *Russell Roberts*, for the plaintiff, were not called upon.

* 2 K. & J., 753.

† 4 K. & J., 743.

† 1 Drew., 617.

§ 2 Ch. D., 721.

JAMES, L.J.—The defendant Barker demurs on the ground that the plaintiff merely prays declarations on certain questions, and that no decree giving relief can be made. The statement of claim, however, asks, not only for declarations, but for further or other relief, that is, that the proper consequential order may be made, and there would be no difficulty in framing a consequential order based upon the findings in those questions. It would, I think, be easy to direct a conveyance to be made to the proper persons according to one finding, and to direct the money to be dealt with according to the other finding. Then it is said that in the three cases which were cited under the old law it was held that, under the Act 15 & 16 Vict., c. 86, a plaintiff could not file a bill for a mere declaration, unless there were some consequential relief which the Court had the power of giving. It appears to me that in those cases the Court adopted rather a narrow view, though it certainly would not have done to ask the Court to make a declaration upon mere abstract questions, and possibly it would not be right to ask a Court of Equity to decide something which would have to be determined in a Court of Law. In the present case declarations are asked with regard to certain rights for the purpose of clearing the estate which has to be administered. The case is very fairly stated, and it is right that the questions should be determined, the contract having been entered into by a deceased person and his representatives having conflicting interests with regard to

it. The real representatives take one view and the personal representatives take another view, and the estate must be administered. It appears to me that the Vice-Chancellor was quite right in saying that there is a subject matter for decision, and that it is proper that the questions should be answered; and that the Court should retain in its hands the power of giving consequential relief. Then, as to the difficulty suggested, that the defendant Barker will be kept here as a party while questions in which he is not interested are dealt with and disposed of, one of the most beneficial of the Rules under the new system* is, that it is quite competent for the Court to say, we will have those two questions in which he is interested tried first—the first two questions, which relate entirely to the demurring defendant, viz., as to what are his rights under the contract, and the Court can put those two questions in the course of the trial in the first instance, and determine them as between him and the other parties, and he will not be prejudiced in any way by the other matters which have been disposed of. It seems to me it would be quite right that the Court should determine, in the first instance, what are the rights of Mr. Barker as against the representatives of the testator. I think that the Vice-Chancellor's order was quite right. The appeal must be dismissed with costs.

MELLISH, L.J.—I agree that this is not a demurrable statement of claim.

BAGGALLAY, L.J.—I am of the same opinion.

* Order XXXVI., Rule 6.

I felt a good deal pressed at first by the decisions of Vice-Chancellor Wood in the cases of *Rooke v. Lord Kensington* and *Bristow v. Whitmore*, but it appears to me there is no room in this case for the objection which prevailed there. The 50th section of the 15 and 16 Vict., c. 86, empowers the Court of Chancery to make binding declarations of right without giving consequential relief; and Vice-Chancellor Wood was of opinion that it only empowered the Court to make such declarations of right in cases in which some equitable relief might be granted, if the plaintiff chose to ask for it. But in this case it appears to me that, consequential upon the declaration of rights which is asked for, several forms of relief might be granted. It is only necessary to mention one: £6,000 Consols have been placed in the names of the trustees of the settlement, and the consequential relief upon the declaration would be a direction as to the application of that fund.

BARKER v. COX.

The trustees of the will of the testator appealed from the decision of the Vice-Chancellor ordering their demurrer to stand over till the hearing.

Kay, Q.C., and *Woodroffe*, for the appellants.

Russell Roberts for the legal personal representatives who had not appealed.

Sir H. Jackson, Q.C., and *Chapman Barber*, for the plaintiff, were not called upon.

JAMES, L.J.—I am of opinion that this demurrer was properly dealt with by the Vice-Chancellor.

The appeal must be dismissed with costs.

MELLISH, L.J., and BAGGALLAY, L.J., concurred.*

RULE 8.

(*Married Women suing without their Husbands.*)

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

(*Sittings in Banco, before BLACKBURN and*

LUSH, JJ.)

May 12th, 1876.

OAKES v. REDFORD.

This was the first case, since the Supreme Court of Judicature Acts, of a claim against a married woman in an action on the ground of her having a separate estate. Before these Acts, though a married woman could not be personally sued at law or in Equity, on a contract, her separate estate, if she had any, could be charged in a suit in Equity on any contract equitably charging it. This was an action by a dressmaker against a married lady on the ground that she was living separate from her husband, and that she was entitled to a separate allowance free from the control of her husband, and that she had agreed to charge her account on that fund. The lady demurred to this claim as not maintainable, on the double ground that it did not appear that she had any separate estate within the contemplation of Equity, and that, if she had, it did not appear that it had been duly charged according to the rules of Courts of Equity.

Benjamin, Q.C., and R. G. Arbuthnot for the plaintiff.

* 3 Ch. D., 359; 35 L. T., 685; 11 N. C., 162.

Beresford for the defendant. This was a mere allowance from her husband, and was not what a Court of Equity regarded as a separate estate. Moreover, the law not being altered, the fund only was chargeable, not the lady personally, and leave had not been obtained for the married woman to be sued alone. In Equity the husband or trustee was always a party. [The COURT, as to this point, observed that Order XVI., Rule 8, provided that a married woman can be sued if the Court or a Judge shall allow it. But here there was no such leave.]

BLACKBURN, J., said that it might be very material that the husband or the trustee should be made a party to the suit. The husband could state the nature and reason of the allowance, and show good grounds why it should not be charged; or the trustee might show the nature of the fund which constituted the separate estate. It was an insuperable bar to this suit that the husband was not a party to it. There appeared to be no case in a Court of Equity any more than in a Court of Common Law of a married lady sued separately without her husband or trustee. There would be extreme injustice in making a charge upon the allowance in the absence of the husband, who might show good reason for not charging the allowance with bygone debts. At present no judgment could be given on the claim, and the action must be amended by bringing in the husband.

LUSH, J., concurred.*

**Times*, Monday, May 15th, 1876.

RULE 9.

(Action by one of numerous Parties having the same interest.)

QUEEN'S BENCH DIVISION.

(Before BLACKBURN, QUAIN and FIELD, JJ.)

February 23rd, 1876.

DE HART v. STEPHENSON.

This was an action by one of several joint owners of a steamship, "on behalf of himself and numerous other parties having the same interest," against the charterers. The names of all the parties on behalf of whom the plaintiff sued had been disclosed under a Master's order; and the defendants afterwards applied at chambers, calling on the plaintiff to show cause why the said parties should not be added as plaintiffs. DENMAN, J., referred the matter to the Court, in order to obtain a construction of Order XVI., Rule 9, with regard to the meaning of "parties having the same interest," and a decision as to the extent to which that Rule is compulsory.

Shield, for the defendants, in support of the application.—This action was brought by the plaintiff under Order XVI., Rule 9. The plaintiff assumes that the interest of the owner of one-sixty-fourth part of the vessel is the same as that of the owners of the other sixty-three parts. By the course the owners have adopted we are restricted to look to one of them for our costs if we are successful. The owners thus

Order XVI., Rule 9, applies to an action brought by one of several joint owners of a ship against the charterers.

may put up a man of straw to fight their battle for them. [QUAIN, J.—Your application would bring back the worst abuse of the old procedure. The last case I remember of the kind was one in which a special pleader pleaded in abatement, and forty plaintiffs were joined. He then pleaded that the plaintiffs formed an illegal association, and had no right to sue.] But the Court has power to add plaintiffs, although the power of pleading in abatement is taken away. [BLACKBURN, J.—Not unless you can show good cause for it. Here you have not done so; you have all your rights against the one owner, and would have no further rights against all of them together.] If the co-owners are not to be joined as plaintiffs, they ought in some way or other to be made subject to the consequences of the litigation. The Court of Chancery limits the practice, and analogous limitations should be placed upon it here.

Crompton, for the plaintiff, was not called upon.

BLACKBURN, J.—There can be no doubt that Rule 9 of Order XVI. was intended to meet precisely such a case as the present. Additional parties can be introduced either as plaintiffs or defendants under Rule 13; but not unless satisfactory reasons are given. No such reasons have been given here, and therefore Rule 13 does not apply. You may have some ground for applying for security for costs, but the present application must be refused with costs.

QUAIN and FIELD, JJ. concurred.*

* 1 Q.B.D., 313; 45 L. J. (Q.B.), 675; 24 L.R., 367.

CHANCERY DIVISION.

(Before Sir CHARLES HALL, V.C.)

January 13th, 1876.

(1) COOPER v. BLISSETT.

This was an action by a creditor against an administratrix and heiress-at-law of an intestate for the administration of the real and personal estate. The creditor did not in his writ of summons sue on behalf of himself "and all other the creditors," but indorsed his writ according to the first form of the general indorsements in Appendix (A), Part 2, S. 1, with a claim "as a creditor" simply. Minutes of the usual order embracing an inquiry as to debts generally had been agreed upon.

Form of the writ of summons in an administration action by a creditor. Addition of the words "on behalf of himself and all other the creditors."

Grosvenor Woods, for the plaintiff.—Under the old practice a creditor sued for administration of the real and personal estate of his debtor "on behalf of himself and all other the creditors;" and where he has purported to sue on his own behalf alone the bill has been taken as a bill on behalf of all the creditors. *Woods v. Sowerby*.* This was apparently no longer the practice; but if the Court considered that under the new practice a creditor should indorse his writ with a claim on behalf of all the creditors, he asked for leave to amend accordingly.

Seeley for the defendant.

HALL, V.C., said that the point had ceased to be considered important even under the old practice. The late Lord Justice Giffard, when Vice-Chancellor, said † that this was an objection

* 14 W.R., 9.

† *Woolldridge v. Norris*, L. R., 6 Eq., 411, 414.

which he should not, in any case, allow to prevail. The usual decree comprised an account of what was due to the plaintiff "and all other the creditors of A. B. deceased," and it thus appeared on the face of the decree that the action was for the benefit of all the creditors. It was therefore unnecessary for the plaintiff to sue in terms on their behalf.*

CHANCERY DIVISION.

(Before Sir GEORGE JESSEL, M.R.)

January 29th, 1876.

(2) WORRAKER *v.* PRYER.

This was an action by a creditor against Jane Pryer, the executrix and devisee in trust of the real estate of Ambrose Pryer, deceased, for the administration of his real and personal estate. The testator had not devised his real estate in trust for sale. The creditor did not, in his writ of summons, sue on behalf of himself "and all other the creditors," but indorsed his writ according to the first form of the general indorsements in Appendix (A), Part II., S. 1, with a claim "as a creditor," simply.

Everitt, for the plaintiff, referred to the form of indorsement given in Appendix A, Part II., S. 1, No. 1. From the form it did not appear to be necessary for a creditor to sue "on behalf of all other the creditors." [JESSEL, M.R.—That only relates to the indorsement, which would in this respect have been just the same

* 1 Ch. D. 691, 45 L. J. (Ch.), 272; 24 W. R., 235. See Daniel's Chancery Practice, 208 and Form 2, 225.

under the old practice. You need not express in the indorsement of claim, any more than you need formerly have expressed in the prayer, on behalf of whom you sue.] The point has been recently decided by Vice-Chancellor Hall, in *Cooper v. Blissett*,* in favour of the form which has been adopted in this case. His lordship seems to have considered that *Wooldridge v. Norrist*† shows that the practice of suing on behalf of all the creditors was no longer necessary even in the Court of Chancery. It may be observed, however, that that view is not in accordance with the previous case of *Ponsford v. Hartley*.‡ See, also, *Woods v. Sowerby*.§

Chubb for the defendants.

JESSEL, M.R.—The original rule of the Court of Chancery with regard to these representative suits was this:—The Court required every person interested to be a party; but when it was impossible to bring all such persons before the Court by reason of their number, the Court allowed one to sue on behalf of the rest, and this applied to creditors' suits. But a creditor was not allowed to come in under the decree without contributing his share to the costs of the suit. By section 42 of the Statute 15 & 16 Vict., c. 86, a defendant was prohibited from objecting for want of parties in certain cases. But those cases did not include creditors' suits; with respect to them distinct provision was made by section 45, which enabled a creditor

* Reported *supra*, p. 283.

† L.R., 6 Eq., 411.

‡ 2 J. & H., 736.

§ 14 W.R., 9.

to obtain an administration order as to the personal estate, and by section 47, which enabled him to obtain an administration order as to the real estate, but only where the whole of such real estate was by devise vested in trustees for sale, empowered to give receipts. But the old practice still applied where the real estate was not devised in trust for sale. Vice-Chancellor Giffard, in *Wooldridge v. Norris*,* where objection was raised to a creditor's suit not expressed to be brought on behalf of all the creditors, overruled it on the ground that an express trust had been created for the benefit of the creditors suing. He did say generally, it is true, that he would not have allowed the objection to prevail, but that he would have given leave to amend. In *Ponsford v. Hartley*† the demurrer was allowed on the express ground that the suit was not brought on behalf of all the creditors, although the plaintiff sought a decree for the administration of the real estate. Therefore I am satisfied that Vice-Chancellor Giffard did not intend to lay down anything contrary to the old practice. Then we come to *Cooper v. Blissett*,‡ just decided by Vice-Chancellor Hall, before whom *Ponsford v. Hartley* does not appear to have been cited. Undoubtedly his is a view in accordance with good sense. But I can find nothing in the new Rules to change the old practice, which is to prevail when it is not expressly altered. Order XVI., Rule 9, ex-

* *Ubi supra.*

† *Ubi supra.*

‡ Reported *supra*.

pressly recognises the practice of the Court of Chancery in representative suits; and Rule 11 of the same Order makes section 42 of the 15 & 16 Vict., c. 86, generally applicable. So that the intention clearly is to perpetuate the practice of the Court of Chancery. Accordingly, I think that the writ should be amended by making the plaintiff sue on behalf of himself "and all other the creditors."*

CHANCERY DIVISION.

(Before Sir GEORGE JESSEL, M.R.)

February 12th, 1876.

(3) EYRE v. COX.

This was an action by a creditor for the administration of real and personal estate.

Bevir applied to the Court for leave to amend the writ of summons.

JESSEL, M.R.—Where it appears on the statement of claim that the plaintiff is suing on behalf of himself "and all other the creditors," it is not necessary to amend the writ by the insertion of these words.

The writ, however, as well as the statement of claim ought to be intituled, according to the forms of statement in Appendix (C),† "In the matter of the estate of A. B., deceased;" for the object of that heading was that the register should show what estates were affected by actions for administration.‡

* 2 Ch. D., 109; 45 L. J. (Ch.), 273; 24 W. R., 269. See Daniel's Chancery Practice, p. 208 and Form 2,225.

† Forms 2, 3 & 4.

‡ 24 W. R., 317. See *Woods v. Sowerby*, 14 W. R., 9.

CHANCERY DIVISION.

(Before Sir RICHARD MALINS, V.C.)

March 31st, 1876.

ADCOCK *v.* PETERS.

This was a creditor's action for the administration of the real and personal estate of Ebenezer Peters.

Procter, for the plaintiff, submitted to the Court the question whether the plaintiff ought not to sue "on behalf of himself and all other the creditors."* The Master of the Rolls, in *Worraker v. Pryer*,† held that the writ of summons ought to be so headed; but in *Cooper v. Blissett*‡ Vice-Chancellor Hall took the opposite view.

W. R. Cole for the defendant.

MALINS, V.C., took the same view as the Master of the Rolls in *Worraker v. Pryer*; and directed the writ of summons to be amended by adding the words "on behalf of himself and all other the creditors."§

RULE 10.

(*Statement of the names of Co-partners.*)

See the case of *POLLOCK v. CAMPBELL BROTHERS*, reported under Order II., Rule 6, *supra*, p. 191; and the case of *PIKE v. FRANK KEENE and BYNE*, reported under Order XV., Rules 1 and 2, *supra*, p. 262.

* See Daniel's Forms, No. 2,225.

† Reported *supra*, p. 284.

‡ Reported *supra*, p. 283.

§ W. N., 1876, p. 139.

RULE 12.

(The Probate Rules, as to parties, shall remain in force.)

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE.

Before Sir JAMES HANNEN, J., President.

KENNAWAY v. KENNAWAY.

The plaintiff, as executor of Mark Kennaway, solicitor, of Exeter, propounded the will of the deceased. The will dealt with both realty and personalty, and the Rev. W. B. Kennaway, as the sole next of kin, had been made defendant. Certain alterations made by the testator in his will involved a complete change in the disposition of the reversionary interest in the real estate and in the residuary real and personal estate, and the plaintiff had been advised that the devisees and other persons affected by the alterations, some of whom were out of the jurisdiction, should be cited to see proceedings.

The practice under s. 61 of the Probate Act, 1857 (20 & 21 Vic. c. 77), of citing the heir-at-law, devisees, and others having interest in real estate, to see proceedings is, by virtue of Order XVI., Rule 12, still in force, notwithstanding the provisions of Order XVI., Rule 13, as to adding parties.

C: A. Middleton, for the plaintiff. We do not want all the devisees to be made defendants, and we wish to avoid the effect of the Rules as to service of parties out of the jurisdiction. The only Rules bearing on the subject are Order XVI., Rules 12 and 13. By Rule 12 the existing Rules as to parties in Probate actions are to "continue to be in force." The presence of these persons is not "necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action," but it is merely necessary that they should be notified

as to the proceedings, and therefore it is not requisite to add them as parties under Order XVI., Rule 13. The practice of citing the heir-at-law, devisees and other parties interested in real estate to see proceedings is founded on s. 61 of the Probate Act, 1857 (20 and 21 Vict. c. 77), (for there was no original jurisdiction in the matter), and there is nothing in the Supreme Court of Judicature Acts to repeal that statutory provision.

Cur. adv. vult.

March 21.—HANNEN, J.—The question arises whether the proper mode of bringing the devisees whose interests are affected before the Court is to cite them to see proceedings, or whether the plaintiff should proceed by writ of summons. The question turns on the construction to be put upon Order XVI., Rules 12 and 13. The effect of Rule 12 is that it remains, as before, unnecessary that the persons now sought to be cited should be made plaintiffs or defendants in the suit. But by the practice of the Probate Court, continued from the Prerogative Court, an executor in the position of the present plaintiff had the power of citing persons interested in the litigation as next of kin or legatees to see proceedings, and, by the Probate Act, 1857 (20 & 21 Vict. c. 77), s. 61, a similar power was given of citing "the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will." This did not make the persons cited parties to the suit, either as plaintiffs or defendants, but it gave them the opportunity of appearing and taking

part in the proceedings on the side of the plaintiff or the defendant, as their interests might incline them, or they might abstain from appearing, and allow the suit to be determined in their absence. This practice remains in force unless it has been altered by some portion of the Supreme Court of Judicature Acts or Rules. The only provision which can be supposed to effect such an alteration is that in Order XVI., Rule 13, by which it is enacted that "the Court or a Judge may, at any stage of the proceedings, . . . order that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added." The object of this provision was to give to the High Court the power which the amalgamated Courts, or some of them, did not before possess, of bringing before it, as plaintiffs or defendants, persons whose presence was necessary in order to do complete justice ; but this is in no way inconsistent with the continued exercise of the power which parties in the Probate Court (subject to the Rules of Court) possessed, of citing parties, whom it was desired to bind, to see proceedings, not in the character of plaintiffs or defendants, but simply as "parties cited," or "interveners," if they thought fit to become so. It appears to me therefore, that the power given by Order XVI., Rule 13, is in addition to, and not in substitution for, the practice which has hitherto pre-

vailed with regard to the citing of parties interested to see proceedings, and that that practice must continue in all respects as before. I give leave to the plaintiff to cite the several persons named as prayed.*

RULE 13.

(No action shall be defeated by reason of the misjoinder of Parties. Power of the Court or a Judge to add or strike out names of Parties.)

CHANCERY DIVISION.

(Before Sir GEORGE JESSEL, M.R.)

February 1st, 1876.

APPLETON v. THE CHAPEL TOWN PAPER COMPANY.

Misjoinder. The proprietors of two distinct bleachworks situated on one stream cannot properly be joined as plaintiffs in one Chancery suit praying for an injunction to restrain the proprietors of a mill higher up on the same stream from polluting it.

The Bill in this case was filed by the occupiers of two distinct bleachworks situated on a stream near Bolton, to restrain the defendants who were the owners of a paper mill higher up the stream, from polluting it. An objection was taken on the score of misjoinder, that the plaintiffs had several rights and interests, and ought to have filed separate bills.

Charles Russell, Q.C., Ince, Q.C., and Romer, for the plaintiffs, argued that the plaintiffs having a common interest might well join, and the objection was not sustainable after 15 & 16 Vict. c. 86, s. 49; for, if either of the defendants failed in establishing his case, the Court could modify its decree accordingly. *Pollock v. Lester*,† *Umfreville v. Johnson*. §

* 1 P. D., 148; 45 L. J. (P. D. & A.), 86; 34 L. T., 854; 24 W. R., 586.

† See also *Harry v. Davey*, 24 W. R., 515.

‡ 11 Ha., 274.

§ L. R., 10 Ch., 580.

Pope, Q.C., and C. H. Turner, for the defendants.

JESSEL, M.R., said there was no pretence for saying the plaintiffs had a common interest, as the rights and remedies of each were distinct; but, it appearing that the objection was not taken by the answer, he would hear the cause by consent, as if two Bills had been filed.*

COMMON PLEAS DIVISION.

Before Lord COLERIDGE, C.J., & ARCHIBALD & LINDLEY, JJ.

February 26th, 1876.

EDWARDS v. LOWTHER.

This was an action of libel against the publisher of a newspaper. The plaintiff, after issue joined, took out a summons before a Master to have the name of Matthew Green, the proprietor, added as a defendant. The summons was dismissed on the ground that the addition of Green was not necessary. On appeal to DENMAN, J., his lordship referred the matter to the Court, without expressing any opinion on the case.

The persons, who, under Rule 3 of Order XVI., might have been joined as defendants at the commencement of the action, may, at any stage in the proceedings, be added, under Rule 13 of Order XVI., as defendants, at the instance of the plaintiff.

Before action it was (as alleged by the plaintiff) impossible to find out the name of the proprietor, and the action was accordingly commenced against the publisher, whose name appeared at the end of the newspaper, and interrogatories were delivered with the statement of claim. The answer to these was not satisfactory, and further answers were obtained which disclosed that Matthew Green was the

sole proprietor. No notice of trial had been given. The application was made under Order XVI., Rule 13.

Macleod, for the plaintiff, in support of the application.

A. L. Smith, for the defendant. Although Green might originally have been joined, yet he was not brought within the words of Rule 13 of Order XVI., "ought to have been joined," *i.e.*, for the purpose of the action, which was to try an issue between the plaintiff and the present defendant. Was not Green's presence necessary to determine this question? in case of trespass by B. and C. against A., if the action was originally commenced by A. against B., C. could not afterwards be joined. Order XVI., Rule 17, provided for such an application as this by a defendant, but not by a plaintiff. The present application was really for the purpose of damages, not for the purposes of the action.

PER CURIAM.—The Court must not give to the Rules of Court a pleader's interpretation, but must be guided by their general spirit. Although the question between the plaintiff and Green may not be *the* question in the action, still it is "*a* question involved in the action." Rule 3 is part of the same Order, and must, therefore, be read together with Rule 13, which will then clearly mean one who ought to have been joined at first, *i.e.*, for the purpose of convenience and of *doing justice in the action*.—therefore, Green's name must be added.*

* 45 L. J. (C.P.), 417; 34 L. T., 255; 24 W. R., 434.

CHANCERY DIVISION.

(Before Sir CHARLES HALL, V.C.)

June 28th, 1876.

THE NEW WESTMINSTER BREWERY v. HANNAH.

The old Westminster Brewery Company had transferred all its "property, estates, and effects, with the appurtenances," including a mortgage "with the benefit of all securities" for the amount due, to the present plaintiffs, the new company, and had been wound up.

Where a right of action does not pass by a deed of transfer of property, the transferee cannot join the transferor as co-plaintiff for the purpose of enforcing the right of action.

At the date of the transfer the old company claimed a right of action for breach of trust in respect of this mortgage against the defendants, the representatives of Hannah, one of its directors, who had died.

Cookson, Q.C., and *Whileborne*, for the plaintiffs, contended that the right of action passed to the plaintiffs, the new company, under the deed of transfer, but, if not, the plaintiffs could join the old company as co-plaintiffs under Order XVI., Rule 13.

Dickinson, Q.C., and *Horton Smith*, for the defendants, were not called upon.

HALL, V.C., held that the right of action did not pass to the plaintiffs, and that, as they themselves had no right of action, they could not join the old company as co-plaintiffs under Order XVI., Rule 13.*

* W. N., 1876, p. 215; 24 W. R., 899. Affirmed on appeal, W. N., 1877, p. 35.

CHANCERY DIVISION.

(Before Sir RICHARD MALINS, V.C.)

March 10th, 1876.

VALLANCE v. THE BIRMINGHAM AND MIDLAND
LAND AND INVESTMENT CORPORATION.

Where the plaintiff, in an action to restrain a corporation from completing a purchase of building land, was added, under Order XVI., Rule 13, on his own application as a defendant to another action in which an order was made, by consent, that the purchase should be completed, the name of the corporation was struck out, under the same Rule, as defendants in the former action; but the corporation were refused costs; on account of the lateness of their application to be struck out.

This was an action to have the sale of certain building land of the plaintiff by the defendant Fallows, who was mortgagee, declared void, and for an account, and to restrain the defendants the Birmingham and Midland Land and Investment Corporation, who had agreed to purchase the land from Fallows, from completing the purchase.

In another suit of *Cannot v. Fallows*, to which the plaintiff in this action had been added as a party on his own application, an order had been made by consent that the Birmingham and Midland Land and Investment Corporation should complete the purchase of the land and pay the purchase-money to Fallows, on his undertaking to deal with it as the Court should direct, and without prejudice to any of the questions involved in the present action.

Robinson, Q.C. (W. P. Beale with him), moved on behalf of the defendant corporation for an order under Order XVI., Rule 13, that they might be struck out as defendants in this action, and that the plaintiffs might be ordered to pay to the defendant corporation their costs of this action. The plaintiff was a party to a consent order in another suit, which estopped him from suing the defendant corporation.

Glasse, Q.C., and *Northmore Lawrence*, for the plaintiff *Vallance*, contended that, inasmuch as the defendants had put in their statement of defence and issue had been joined, this application was too late, and the Court could not now make the order.

Rigby, for *Fallows*, said that the proceedings of the plaintiff had been vexatious.

Robinson, Q.C., in reply, urged that the putting in of the statement of defence was to show the uselessness of the suit. Order XVI., Rule 14, showed that the application may be made at any time before trial.

MALINS, V.C.—So far as I am aware, this is the first application which has been made before me under Order XVI., Rule 13, to strike out a defendant from an action. I regard the power thereby given to the Court as very valuable, and as one which may frequently be exercised with advantage. This action and that of *Cannot v. Fallows* relate to the same subject-matter.

Vallance has bound himself by his consent to the payment of the purchase-money to *Fallows*, and not to dispute the sale; how can he now carry on a suit to dispute its validity and restrain its completion? This litigation can have no result as against the defendant corporation, and the sooner it is put an end to the better. Under Order XVI., Rule 13, the Court has power to add or strike out parties; I exercised the first power in the case of *Cannot v. Fallows* in favour of the present plaintiff; I am now asked to exercise the second power. Before

the Supreme Court of Judicature Acts came into operation, it often turned out at the hearing that defendants had been vexatiously brought or kept before the Court. The Legislature has now expressly remedied this grievance. If I find, as in this case, that persons have been vexatiously made or retained as parties, I shall gladly exercise this power. I am clearly of opinion that, as soon as it is ascertained that the suit is hopeless as against any defendant, it becomes the duty of the Court to strike him out at the earliest possible stage of the proceedings. But the consent order was made three months ago; the defendant corporation should have moved to be struck out immediately. I shall make the order to strike out the name of the defendant corporation, but without costs. I hope that this case will establish a precedent.*

RULE 14.

(Application at the Trial to add, strike out, or substitute a Plaintiff or Defendant.)

NORTH-EASTERN CIRCUIT, NEWCASTLE. CIVIL SIDE.

(Before Mr. JUSTICE LUSH and a Common Jury.)

July 8th, 1876.

WARDLEY v. GREAGG.

*In an action
at Nisi Prius
leave was
refused to join*

Waddy, Q.C., and Greenhow, were for the plaintiff; Herschell, Q.C., was for the defendant.

* 2 Ch. D., 369; 24 W. R., 454.

This was an action, brought by an old lady of 67, to recover £400 and furniture. Prior to 1872 her husband was a farmer, and she, by a careful and thrifty management of the home-
 stead, had saved over £400, which he allowed her to regard as her own. Mr. Wardley then gave up the farm, and having, unfortunately, joined his eldest son, Joseph, in a scavenging contract with the Gateshead Corporation which turned out unsuccessfully, his affairs were liquidated in bankruptcy, and after payment of 9s. in the pound to his creditors he still retained the £400 and his furniture. His health having failed him, he was persuaded by his eldest daughter, who was married to the defendant, an engine-driver, to go and live in a room in their house, and, accordingly, his furniture and a safe containing the £400 were conveyed there. The safe was kept in his bedroom, and every night, when he went to bed, he rolled up his trousers, in the pocket of which he always kept the key of the safe, and put them under his pillow. Every Saturday night he paid his daughter a sovereign for the board and lodging of himself and wife from a private purse he had in his pocket. One night, when the old man was on his death-bed, the plaintiff, who was in bed by his side, heard a footstep, and saw her daughter snatch the trousers from under his pillow, while the defendant stood at the door with a lighted candle. The plaintiff did her best to get the trousers back from her daughter, but the latter twisted her arm round and called out to her children, "Mother's in a

the trustee in bankruptcy of the plaintiff's late husband as co-plaintiff on application made at the trial, on the ground that the question whether the trustee in bankruptcy was entitled to the fruits of the verdict was not a question involved in the action.

fit ; throw some water over her." Unable to get back the trousers or the key of the safe, the plaintiff rushed down stairs into the yard, screaming, "Murder!" and "Robbers!" and, in the presence of a neighbour who was aroused by her shouts, challenged her daughter with having taken the trousers. Next morning she would have gone down to the police-station, but her husband begged her not to disturb his dying moments, and assured her the daughter would give up the key. He died a few days after, and while he lay dead in his room the plaintiff saw her daughter open the safe and take out the money, which consisted of seventy-seven £5 notes and £20 in gold. Again and again the plaintiff asked for the money, but the daughter always refused to give it up, and at last tried to coax her into investing it in a building society, of which her husband was a member, in redemption of a mortgage for an advance made to him, but the plaintiff, upon learning from the secretary that she could not have the money back again when she wanted it, refused to consent to this. Time went on, and eventually, having been very badly treated by her daughter, who refused to give up the money or even the furniture, the plaintiff was driven to the workhouse. It was admitted she was entitled to the furniture, and that the old man died possessed of £350, although the defendants denied all knowledge of its whereabouts, and it was attempted to explain away the plaintiff's story by suggesting that she was given to drinking.

The jury, without leaving the box, at once found a verdict for the plaintiff for £350, which, after deducting £42. 10s. for the old man's maintenance before his death, and the plaintiff's board since, left a verdict for £307. 10s. and the furniture. The Judge granted execution in 14 days.

In the course of the case *Gainsford Bruce* applied under Order XVI., Rule 13, on behalf of the trustee in bankruptcy, to be allowed to intervene, on the ground that the trustees would be entitled to the fruits of the verdict.

LUSH, J., thought the question was outside, and not "involved in the action," and therefore refused to allow the trustee to intervene; but, in order to give him an opportunity of taking the opinion of the Court above, directed that the money should be paid into court, and the opinion of the Court above be taken within a fortnight.

Bruce preferred taking the opinion of the Judge in the Bankruptcy Court; and it was agreed that an application should be made to, and the matter be decided by, him.*

* *Times*, Thursday, July 13, 1876.



REPORTS OF CASES
DECIDED AT
JUDGES' CHAMBERS
UNDER THE SUPREME COURT OF
JUDICATURE ACTS
(WITH COPIOUS INDEX AND MARGINAL NOTES).

BY
W. T. CHARLEY, D.C.L., M.P.,
OF THE INNER TEMPLE, ESQUIRE, BARRISTER AT LAW, AUTHOR OF "THE NEW
SYSTEM OF PRACTICE AND PLEADING UNDER THE SUPREME COURT
OF JUDICATURE ACTS, 1873 AND 1875,"
&c.

LONDON :
WATERLOW & SONS, LIMITED, GREAT WINCHESTER ST.,
LONDON WALL, AND PARLIAMENT STREET.

1877.

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REPORTS OF CASES
DECIDED AT
JUDGES' CHAMBERS.

SUPREME COURT OF JUDICATURE ACT,
1873.

SECTION 22.

I.

This was an action on a bond against a surety. The declaration was delivered on 26th Oct., 1875, and a statement of defence was afterwards delivered, which was struck out by the Master, who also refused defendant's application to proceed under the Supreme Court of Judicature Acts. The defendant's affidavit stated that he had a good equitable defence to the action.

ARCHIBALD, J.—You do not say what your equitable defence is. If you could have shown a good reason for the reform, I would have made it; but your statement of defence is very bald, and your affidavit does not supplement it.

No order. Appeal dismissed with costs.*

II.

This was an *ex parte* application for leave to proceed under the Supreme Court of Judicature Acts in order to deliver a counter claim. The action was commenced under the old system, and the declaration was for goods bargained and sold, the plea being "never indebted." The action was

Where the declaration was delivered before the 1st November, 1875, in an action on a bond against a surety, leave to proceed under the Judicature Acts, on an affidavit that defendant had a good equitable defence without showing what it was, was refused (Feb., 1876).

Leave to proceed under the Judicature Acts, in order to deliver a counter-

* *Weekly Notes*, February 5th, 1876 (Monday, January 24th); *Solicitors' Journal*, *Ib.*; *Law Times*, *Ib.*

claim, in an action for goods bargained and sold, commenced before 1st November, 1875, and remitted to the County Court, refused (February, 1876).

remitted from the High Court to the County Court on Nov. 26th, 1875. An application was subsequently made to the County Court Judge for leave to deliver a counter-claim,* and he adjourned the action for two months to enable the defendant to apply to a Judge of the High Court for leave to proceed under the Supreme Court of Judicature Acts. It was stated that the application was made *ex parte* by consent.

DENMAN, J.—There is no proof that the other side consent before me; and the cause has now gone on too long under the old system to transfer it to the new.

No order.†

SECTION 24.

SUBSECTION (3).

MACDONALD v. BODE.

To bring in a third party, defendant's claim against him need not be in the action. A counter-claim and set-off, containing a claim against a third party, was allowed, in an action on a bill of exchange by the (alleged) indorsee, the defendant having pleaded in his defence that the plaintiff was

This was an action on a bill of exchange, and the defendant now appealed from Master Hodgson's order, striking out the counter-claim which had been delivered.‡ The statement of defence alleged that the bill had never been indorsed by Alexander, the drawee, to the plaintiff, or if it had been so indorsed, that there had been no consideration for such indorsement, and that it was held by the plaintiff solely as trustee for Alexander. The set-off and counter-claim alleged that Alexander and the defendant were jointly engaged to act for a company, and that they agreed that the commission which they should receive for their services was to be equally divided between them, and that Alexander fraudulently refused to account for commission he had received.

Foard for the plaintiff—That Macdonald is a trustee for Alexander is a mere allegation; they do not show that it is true. This is not a claim

* See Order XIX., Rule 3.

† *Law Times*, February 19th, 1876 (Saturday, February 5th); *Solicitors' Journal*, *Ib.*; *Weekly Notes*, March 4th, 1876.

‡ See Order XIX., Rule 3.

within the action. There must be a distinct and specific claim; and here there is no distinct claim.

Kelly for the defendant.

a trustee for the third party.

LINDLEY, J.—From Order XVI., Rules 17 and 18, it would appear that to bring in a third party, the defendant's claim against him must be in the action. But section 24, subsection (3), of the Act of 1873, gives a wider power. Supposing Alexander was the plaintiff, the set-off would be certainly good. Then they allege that Alexander is the real plaintiff. As they raise the defence that Macdonald is a trustee for Alexander, I shall allow them to set up this counter-claim and set-off.

Order of Master rescinded. Costs in the cause.*

SUBSECTION (5).

I.

This was an application to stay proceedings in an action on two solicitors' bills of costs. The writ had been issued on Oct. 21, 1875, declaration Oct. 30, statement of defence Nov. 10, reply Nov. 27. A summons had been taken out now in the Rolls for an order to tax, and it was asked to stay proceedings in the action. An objection was taken that the application had been delayed too long; but, on the defendant agreeing to withdraw all his defence except as to the costs being taxed,

Proceedings stayed in an action on two solicitors' bills of costs, commenced before the 1st November, 1875, on the defendant agreeing to withdraw all his defence, except as to the costs being taxed, and paying plaintiff's costs of action subsequent to the writ, and the costs of the application.

LINDLEY, J., said that he would make the order, putting the plaintiff in the same position as he would have been in if the defendant had made this application promptly.

Order to stay all further proceedings in the action. The defendant to pay the plaintiff's costs of the action subsequent to the writ up to the present time, including the costs of this application, defendant undertaking to obtain an order to tax with all practicable speed.†

* *Weekly Notes*, January 22nd, 1876 (Saturday, January 15th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, January 29th, 1876 (Friday, January 21st); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

II.

KEVERS v. MICHELL.

Proceedings stayed in an action, on payment into Court of the amount claimed, defendant having brought a Chancery suit against plaintiff for an account.

W. D. Rawlins, on behalf of the defendant, applied *ex parte* for a stay of proceedings in the action:—Unless we obtain this stay execution will not be issued to-morrow. A Chancery action is pending brought by the defendant for an account. The plaintiff is willing to pay the amount of the judgment into court.

ARCHIBALD, J., ordered, on payment into court of £504, a stay of proceedings for ten days.*

SECTION 25.

SUBSECTION (6).

LACEY v. WIELAND.

Leave given to defendant to pay into Court the amount of a judgment debt, notice having been given him of conflicting claims to it.

Shiress Will for the defendant.—An award had been given against us, and judgment signed for Lacey, the present plaintiff. We are quite ready to pay, but two claims have been made upon the judgment debt. Notice in writing of an assignee has been given us, and Lacey has become bankrupt and the assignee under his bankruptcy claims the money. It is right to say that an appeal, Lacey's part, is pending against the order of bankruptcy.

LINDLEY, J., made an order that the defendant be at liberty to pay the money into court, his costs to be taxed. Proceedings as against the defendant to be stayed.†

SUBSECTION (8).

I.

Interim injunction

This was an *ex parte* application for an order substituting service of a writ upon defendant.

* *Weekly Notes*, February 5th, 1876 (Monday, January 24th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, January 22nd, 1876 (Saturday, January 15th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

manager, Mackenzie, defendant being abroad.* An injunction was also asked for to restrain M'Arthur, the defendant, from negotiating a bill of exchange, which had been put into his hands by the plaintiff, who was holder for value, to discount. He had not discounted the bill, and refused to return it, and it was this bill that was the subject of the action. In support of the application, it was stated that the plaintiff apprehended the defendant's presenting the bill for payment, getting the money, and going off with it. The bill was indorsed, and, therefore, negotiable. It had been in M'Arthur's hands since the 17th December [1875], and would be due on the 23rd January [1876]. Mackenzie had stated two days previous to this application that the bill was not as yet discounted.

granted on an application by plaintiff ex parte, to restrain defendant from negotiating a bill of exchange, indorsed, and put into his hands to discount, and which was the subject-matter of the action.

LINDLEY, J.—I can grant an injunction to restrain M'Arthur from receiving the money on this bill, as this is one of the cases where the application may be made *ex parte*. Of course, if notice is given of an application for an injunction to restrain anyone from negotiating a bill, the bill might be negotiated before the injunction could be obtained. But you must take care that the indorser is not discharged, which would be the effect of its not being duly presented for payment.

Order for substituted service of writ on Mackenzie. Injunction to restrain the defendant from parting with the bill before the 18th January [1876]; liberty for the plaintiff, on notice to the defendant, to apply in the meantime for further order. Service of this order on Mackenzie to be good service on defendant, plaintiff undertaking to abide by any order as to damages, and to accept short notice.†

II.

This was an *ex parte* application for an *interim* injunction in an action on a bill of exchange. *Interim injunction*

* See Order IX., Rule 2.

† *Weekly Notes*, January 22nd, 1876 (Monday, January 10th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

granted, on an application by plaintiff, ex parte, to restrain defendant from negotiating a bill of exchange, obtained without any consideration.

Monckton, for the plaintiff, said that he was applying *ex parte*, but that notice of this application had been given that day to the other side. It was desired to restrain the defendant from negotiating a bill of exchange obtained without any consideration, until the action.

LINDLEY, J., made an order to restrain defendant from parting with the bill before judgment in the action or further order, plaintiff undertaking to abide by any order the Court might make as to damages, and to accept one day's notice of any application the defendant might make to dissolve the injunction.*

III.

MAKIN v. BARROW.

Interim injunction to restrain defendant, in an action of trespass, from driving over plaintiff's land and so destroying the grass, refused, on an application ex parte by plaintiff.

An *ex parte* application was made for an injunction to restrain the defendant in an action of trespass from continuing his trespasses. It was stated in the plaintiff's affidavit that the defendant had destroyed the grass on part of plaintiff's land by driving a horse and cart over it.

LINDLEY, J.—I never heard of an injunction to restrain a man from trespassing on land with a horse and cart. Injunctions are not ordinarily granted for mere trespass, unless serious injury is threatened to the property. This affidavit speaks of an injury that has been done. You can serve the defendant with notice, if you like, and apply again; but I do not advise that course, as I think you will not get an injunction.†

III.

MAKIN v. BARROW.

Same case. Interim injunction re-

In this case, *Forbes* applied for an interlocutory injunction to restrain the defendant from committing certain trespasses. The plaintiff now

* *Weekly Notes*, January 29th, 1876 (Tuesday, January 18th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, January 29th, 1876 (Wednesday, January 19th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

proceeded upon summons. The plaintiff's affidavit stated that the defendant had erected buildings on his own land, and in order to support such buildings had subsequently erected five buttresses, which encroached upon the land of the plaintiff; that since the issuing of the writ in this action (14th Jan., 1876) the defendant's carts, containing heavy weights, had passed and repassed over the plaintiff's land, thereby cutting up the said land and covering it with ashes and other refuse.

*fused on
summons.*

DENMAN, J.—As to the buttresses there can, of course, be no interlocutory injunction. As to the other alleged trespasses, I doubt whether a sufficient case of continuing injury is shown for me to grant an injunction. The affidavit seems to me to disclose nothing but what may be compensated by damages.

Forbes.—The plaintiff cannot get damages for any injury since the writ.

On behalf of the defendant it was then stated that he would consent to damages being assessed up to the date of trial.

No order, the defendant consenting that the jury at the trial, if a verdict should be found for the plaintiff, shall assess damages for all injury done to the plaintiff's land up to the date of trial. Costs in the cause.*

SUBSECTION (11).

See under Order I., Rule 2, of the First Schedule to the Supreme Court of Judicature Act, 1875.

SECTIONS 34 & 36.

I.

This was an action on a guarantee given by a married woman, and leave had been obtained to amend the indorsement on the writ, so as to charge her separate estate. It was now desired to transfer

*Defendant, a
married
woman, sued
on her
guarantee. The*

* *Weekly Notes*, March 11th, 1876 (Tuesday, February 8th); *Law Times*, February 26th, 1876; *Solicitors' Journal*, *Ib.*

action was transferred to the Chancery Division for the purpose of charging her separate estate.

the action to the Chancery Division, with a view to obtaining an order against her separate estate.

LINDLEY, J., made an order to transfer the action from the Queen's Bench Division to Vice-Chancellor HALL; costs in the Queen's Bench and costs of this application to be disposed of by the Vice-Chancellor.*

II.

That both parties' consent is not a sufficient reason for transferring an action. An application to transfer to the Chancery Division an action by an auctioneer to recover from the vendor the deposit on a sale, which had not been completed owing to an alleged defect of title, was refused, although the defendant had commenced an action for specific performance in that Division.

This was an *ex parte* application by the defendant to transfer to the Chancery Division an action by an auctioneer to recover money which had been paid to him as deposit by an intending purchaser, and handed over to the defendant, for whom the auctioneer was selling. The sale had not been completed through an alleged defect in the title. The defendant alleged, as matter of counter-claim, that the plaintiff did not use due diligence in taking sufficient deposit money; and he had commenced an action for specific performance in the Chancery Division. It was stated that the plaintiff did not object to the transfer.

ARCHIBALD, J.—The plaintiff does not sue for money had and received, but for money lent; from which I should have supposed that he took a different view of the transaction. I do not see that this claim is mixed up with the question of title. Looking at your statement of defence, this claim appears to be perfectly distinct from your claim for specific performance. That both parties consent is not a sufficient reason for transferring a cause.

No order.†

SECTION 45.

I.

BILLING v. NICHOLSON.

The Divisional Court for appeals from

Wheeler moved ex parte for a rule nisi in this case, calling upon the other side to show cause

* *Weekly Notes*, January 22nd, 1876 (Wednesday, January 12th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, February 5th, 1876 (Saturday, January 29th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.* N.B.—See further, under section 11 of the Supreme Court of Judicature Act, 1875.

why the decision of the County Court Judge in their favour should not be reversed. The Judges of the Divisional Court were appointed, but the Court was not yet constituted. BRETT, J., had directed this application to a Judge at Chambers.

LINDLEY, J.—I think the better course now is to extend the time for moving until such time as the Divisional Court shall sit to hear appeals.

Order accordingly.*

County Courts not having yet been constituted, the time for moving for a rule nisi to show cause why the decision of a County Court Judge should not be reversed, was extended.

II.

HILL v. PERSSE.

An *ex parte* application was made in this case for an extension of the time for appealing from the decision of the County Court Judge.

ARCHIBALD, J.—This is an appeal given by statute, and there is, therefore, a difficulty with regard to extending the time. But as I have power to hear the appeal, I can treat this as a first hearing of a motion for a rule nisi.

Further hearing of motion adjourned till the first sitting of the Divisional Court of Appeal.†

An application for an extension of time for appealing from a County Court Judge, was treated as a first hearing of a motion for a rule nisi, and adjourned to the Divisional Court.

SECTION 57.

“Section 57 of the Act of 1873 is practically inoperative as regards compulsory references, no Official Referees having yet been appointed, and Special Referees being only appointed by agreement between the parties; but the compulsory reference under sect. 3 of the Common Law Procedure Act, 1854, is still in force, and therefore matters of account may be referred without consent.” Per ARCHIBALD, J.‡

Matters of account may be referred without consent under section 3 of the C. L. Pro. Act, 1854.

* *Weekly Notes*, January 29th, 1876 (Thursday, January 20th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.* See the County Court Act, 1875, section 6.

† *Weekly Notes*, February 5th, 1876 (Monday, January 24th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.* See the County Court Act, 1875, section 6.

‡ *Weekly Notes*, February 12th, 1876 (Monday, January 31st); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.* N.B.—Official Referees have since been appointed. See Note on p. 59 of Vol. I. of these Reports (Court Cases).

SUPREME COURT OF JUDICATURE ACT,

1875.

SECTION 11.

I.

PADWICK *v.* SCOTT.

The defence to an action on a deed being that the deed was void in equity and ought to be set aside on the ground of undue influence, the action was transferred to the Chancery Division.

This was an application to transfer an action on a deed to the Chancery Division of the High Court. The defence was that the deed was in equity void, and should be set aside on the ground of undue influence.

Chitty, for the plaintiff, referred to the Supreme Court of Judicature Act, 1873, s. 24, subs. (2).

G. Shaw, for the defendant, referred to s. 34 of the same Act.

ARCHIBALD, J.—This case is assigned by s. 34 of the Act to the Chancery Division, as it relates to the rectification, setting aside, or cancellation of a deed.

Order to transfer to Vice-Chancellor HALL.*

II.

Where the plaintiff prays, not for the execution, but for the creation of a trust, the action is a fit one to be tried by a jury.

This was an action brought under the following circumstances: The plaintiff had been, in the year 1849, seduced by the defendant, and by him had become the mother of six illegitimate children. In consideration of the plaintiff's taking charge of the children, the defendant promised to pay her £4,500 on the sale of an estate belonging to him, or £300 a year by quarterly payments. An action

* *Weekly Notes*, February 19th, 1876 (Thursday, February 3rd); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

had been brought and judgment recovered by the plaintiff for quarterly payments then in arrear. Subsequent payments not having been paid on their falling due, the present action was commenced, but the defendant having now sold his estate, and a Chancery suit in respect of the sale having terminated, the plaintiff now claimed, in the alternative, either to recover the payments in arrear or to be paid the sum of £4,500, or the investment of such sum in the name of trustees for her benefit.

Where the plaintiff claimed, in the alternative, payments in arrear, or a lump sum, or the investment of such a sum in the name of trustees for her benefit, an application to transfer the action to the Chancery Division was refused.

A. Charles, for the defendant, now applied for an order that the claim should be amended, or that the action should be transferred to the Chancery Division.—This claim is embarrassing, as I cannot tell whether the plaintiff requires the investment of a lump sum in the name of trustees, or payment of the arrears of the annuity. The plaintiff claims execution of a trust, and that is peremptorily assigned to the Chancery Division by s. 34 of the Supreme Court of Judicature Act, 1873.

J. C. Mathew for the plaintiff.

DENMAN, J.—The plaintiff does not pray for the execution but for the creation of a trust; what she asks for is often done by a jury.

No order.*

III.

JOHNSON v. MOFFAT.

This was an application to transfer the above action to the Chancery Division, on the ground that it was substantially a breach of an order made in the suit of *Moffat v. St. James's Bank*, pending in the Chancery Division. In that suit the following order had been made: "Motion to stand

An order having been made in a Chancery suit that "the defendant should take no pro-

* *Law Times*, February 26th, 1876 (Wednesday, February 9th); *Solicitors' Journal*, *Ib.*; *Weekly Notes*, March 11th, 1876.

ceedings at law," an action at law brought by the defendant, as indorsee of a dishonoured bill of exchange against the plaintiff in the Chancery suit, was transferred to the Chancery Division.

until hearing, defendant undertaking to take no proceedings at law." Shortly after this order was made, a letter was sent to the defendant (the plaintiff in the Chancery suit), demanding payment of a dishonoured acceptance placed in the hands of the writers by their client, Dear. This letter was sent by Rees and Co., who were Dear's solicitors. The bill had been endorsed to Johnson, as it was suggested, for the purposes of this action. The defendant had amended his bill in Chancery, and made Johnson a defendant.

E. Cutler for the defendant.

R. Williams for the plaintiff.

LINDLEY, J., transferred the cause to Vice-Chancellor MALINS, the defendant undertaking to bring the matter to a hearing.*

FIRST SCHEDULE.

ORDER I.

RULE 2.

On an interpleader summons held (by Archibald, J.), that after-acquired property passed under a bill of sale, and that the sheriff seized, subject to the equities.

On a sheriff's interpleader summons, the claimant producing a bill of sale purporting to pass after-acquired property, it was held by ARCHIBALD, J. (following the decision of LUSH, J., vol. 1, Chamber Cases, p. 31), that the principle of the Common Law that such an instrument was void, as a transfer of property acquired since its execution, was now abrogated, and that the sheriff seized subject to the equities, ARCHIBALD, J., observing that he need not express any opinion as to whether such a state of the law tended to encourage fraud.†

* *Weekly Notes*, January 22nd, 1876 (Tuesday, January 11th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, February 12th, 1876 (Tuesday, February 1st); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.* See also section 25, sub-section (11), of the Supreme Court of Judicature Act, 1873.

ORDER II.

RULE 6.

I.

OGUR v. BRADBY.

This was an action under the Bills of Exchange Act brought in the District Registry of Manchester; and the important question was now raised, having been referred by the District Registrar to the Judge, as to whether an action under the Bills of Exchange Act could be carried on in a District Registry. The question was dependent on the construction to be put upon the words of Order II., Rule 6.

Bruce for the defendant.—The only provisions for the issue of writs out of a District Registry are for the issue of writs in the ordinary form. It was never intended that a defendant should be compelled to appear in a District Registry if residing elsewhere. But under the Bills of Exchange Act the whole procedure would have to be altered if the defendant is to have the option of not appearing in the place where the writ is issued. If this action can be brought in a District Registry I must go before the District Registrar in order to obtain leave to appear. See cases reported, Vol. I., Chamber Cases, pp. 32 & 33.

Arthur Wilson for the plaintiff.—I think the apparent difficulty here is overcome if the exact words of Order II., Rule 6, are looked at. The question is, what meaning is to be attached to the words "The procedure under the Bills of Exchange Act?" It is conceivable that that might be read as meaning that the whole procedure in the action was to be the same as it would have been if the Supreme Court of Judicature Acts had not been passed; but that interpretation would be extremely inconvenient, and would further be incompatible with a decision of Mr. Justice Lindley, reported in W. N. of Jan. 22, p. 23, allowing a party in an action under the Bills of Exchange Act to take advantage of the provisions of the

Seemle, that the words "the procedure under the Bills of Exchange Act," in Order II., Rule 6, mean "the procedure so far as it is governed by the Bills of Exchange Act," i.e., so far as relates to the form of the writ, and obtaining leave to appear.

Supreme Court of Judicature Acts for the purpose of joining another defendant. The interpretation that I would suggest was intended to be put on the above words is "the procedure, so far as it is governed by the Bills of Exchange Act." This construction of the words would not be at variance with the decision in the case cited by my friend, which has been affirmed by the Court. That decision went on the ground that there was an express provision in the Bills of Exchange Act for personal service of the writ.* This Act deals also with the form of the writ, and with the obtaining leave to appear, and it is to those provisions that the rule in question applies. As regards matters of procedure not dealt with by the Bills of Exchange Act, an action commenced under that Act should now be carried on under the Supreme Court of Judicature Acts, and not under the old practice. The Act in question has been expressly extended to all the County Courts in England. By Order V., Rule 1, the plaintiff in any action other than a Probate Action, may issue a writ out of the District Registry. Although this Rule makes an express exception it does not in any way except an action under the Bills of Exchange Act. The argument applies with especial force to the District Registry of Lancaster. The powers of Prothonotaries are kept alive by the Supreme Court of Judicature Act, 1873, sect. 78, and they had the power of issuing writs under the Bills of Exchange Act.

DENMAN, J.—If this action can be commenced in a District Registry no doubt the defendant will be at liberty to apply to remove the action to London from the District Registry under Rule 13 of Order XXXV. My own impression is that Mr. Wilson's interpretation of the rule is the correct one; but I shall refer the question to the Court.

All proceedings stayed. Costs in the cause.†

* See Vol. I., Chamber Cases, p. 32.

† *Law Times*, February 26th, 1876 (Tuesday, February 8th); *Solicitors' Journal*, *ib.*; *Weekly Notes*, March 11th, 1876.

II.

This was an appeal from the District Registrar of Swansea, who had refused to set aside an order giving defendant leave to appear. The action was on a bill of exchange, and the defendant had obtained leave to appear under the Bills of Exchange Act. The plaintiff's affidavit stated that the consideration for the bill was the withdrawal of an execution against a third party. Defendant's affidavit denied the consideration.

Butterworth for the plaintiff.

Anstie for the defendant.

ARCHIBALD, J.—I think there is too much contradiction and doubt about this matter to allow the plaintiff to sign judgment.

No order. Costs to be defendant's in any event.*

Where, in an action on a bill of exchange, defendant denied the alleged consideration for the bill, leave was given to him to appear under the Bills of Exchange Act.

ORDER III.

RULE 6.

BARKER AND ANOTHER v. WOOD.

This was an action for money lent. Particulars were applied for by the defendant. No dates were indorsed upon the writ. Notice that a statement of claim was required had been served upon the plaintiff, and such statement was ready for delivery containing all dates and particulars. Master Unthank had ordered particulars, and plaintiff now appealed.

F. O. Crump for the plaintiff.—The defendant has required a statement of claim, which is drawn, and gives full particulars. The practice here has been not to allow particulars before claim. It is putting us to the expense of another document.

ARCHIBALD, J.—I can see a great convenience in allowing particulars before the statement of claim, as the defendant may withdraw, and costs

The power to order particulars has not been abolished. Although notice that a statement of claim would be required had been given to plaintiff, and a statement of claim containing full particulars was ready for delivery, particulars were

* *Weekly Notes*, February 12th, 1876 (Tuesday, February 1st); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.* See, further, under Order XVI., Rules 2 and 13.

ordered to be delivered, in an action for money lent (per Archibald, J.).

may be saved. There is one view of the Act which regards particulars as being now altogether abolished,* but I think that the power to order them has not been abolished.

Appeal dismissed with costs.†

ORDER V.

RULES 1 & 2.

See the case of *OGUR v. BRADBY*, reported under Order II., Rule 6.

ORDER IX.

RULE 2.

Substituted service cannot be ordered of a notice of application for a writ of attachment.

On an application for an order for substituted service of a notice of application for an attachment,‡ an affidavit having been read,

DENHAM, J., said that, supposing it to be taken to be proved that the defendant was wilfully evading service, he knew of no power of ordering substituted service except in the case of a writ of summons in an action.§

ORDER XI.

RULE 1.

PRESTON AND OTHERS *v.* LAMONT, REUBIN, AND RODGER.

Leave given to serve defendant in Scotland, he

This was an *ex parte* application for leave to serve out of the jurisdiction, on appeal from Master Walton.

* See per QUAIN, J., Vol. I., Chamber cases, pp. 35, 36.

† *Weekly Notes*, February 5th, 1876 (Saturday, January 29th); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.* See also under Order XIV., Rules 1 & 3.

‡ See Order XLIV., Rule 2.

§ *Law Times*, February 26th, 1876 (Tuesday, February 8th); *Solicitors' Journal*, *ib.*; *Weekly Notes*, March 11th, 1876. See also under section 25, sub-section (8), of the Supreme Court of Judicature Act, 1873.

C. Dodd in support of the application.—We want to serve the defendants in Scotland. The terms of the contract were that the money should be sent direct to the plaintiff, who resides at Deptford. The money has not been sent.

having committed a breach of contract by not sending money to plaintiff Deptford

LINDLEY, J.—That is a breach within the jurisdiction.

Order, Master's decision reversed.*

ORDER XII.

RULE 3.

See the case of *OGUR v. BRADBY*, reported under Order II., Rule 6, and the next case, *infra*, Rule 4.

RULE 4.

This was an application to set aside an order of Master Unthank giving the defendants time, on the ground that the application should have been made to the District Registrar of Manchester. The action was brought against the North-Western Railway Company to recover damages for personal injuries. The defendants had appeared in the District Registry of Manchester, where the writ was issued; the statement of claim had been filed and delivered there on the 18th Jan. [1876], and a summons for time had been taken out by the defendants in the District Registry, on which they obtained an order. While that order was running, a summons was taken out in London by the defendants for seven days further time to plead, on which the order of Master Unthank was made, which it was now sought to set aside. The explanation of the defendants was, that there had been a mistake on the part of their agents in Manchester, and that they had no authority to appear there. After some discussion as to whether the defendants carried on business in Manchester within the meaning of Order XII., Rule 3,

The defendants, a railway company, having obtained an order in London from the Master for further time to plead, in an action commenced and carried on in a District Registry, the order of the Master was directed to stand, and the action was removed to London, but the defendants were visited with the costs of the application and of all proceedings

* *Weekly Notes*, January 22nd, 1876 (Monday, January 17th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

in the District Registry after writ, for failure to give notice under Order XXXV., Rule 12.

DENMAN, J.—The defendants cannot disavow the act of their agent in Manchester. If they wished the proceedings to be carried on in London, the notice under Order XXXV., Rules 11 & 12, should have been given to the plaintiff. I will let the Master's order stand, but make the defendants pay all the costs.

No order; cause to be removed to London, costs of all proceedings in the District Registry after writ, and of this application and that before the Master, to be the plaintiff's in any event.*

ORDER XIV.

RULE 1.

I.

Leave to sign judgment on a specially-indorsed writ refused, defendant, served in New York (on 5th January), not having had time to instruct his solicitors before the summons was taken out (on Jan. 7th).

In an action for £609 as commission on the sale of tea, in which leave had been obtained to serve out of the jurisdiction the specially-indorsed writ, issued 4th Dec. [1875], and of which service was effected in New York on 5th Jan. [1876].

Held by LINDLEY, J., on a summons to sign judgment taken out on 7th Jan. [1876], and heard to-day, that it was a sufficient reason for not allowing judgment to be signed or ordering the defendant to pay money into Court, that the defendant had not had time to communicate by post with his solicitors his instructions with reference to the summons taken out on 7th Jan. [1876].†

II.

Leave given to sign judgment on a specially-indorsed writ for commission

This was an appeal from the order of Master Dodgson, allowing judgment to be signed under Order XIV., Rule 1. The action was by a stock-

* *Law Times*, February 26th, 1876 (Tuesday, February 8th); *Solicitors' Journal*, *Ib.*; *Weekly Notes*, March 11th, 1876.

† *Law Times*, January 22nd, 1876 (Thursday, January 13th); *Solicitors' Journal*, *Ib.*

broker for commission to the amount of £326. The defendant alleged that he had taken proceedings in bankruptcy, and that he disputed the correctness of the account delivered.

POLLOCK, B., dismissed the appeal with costs.*

by a stock-broker, although the correctness of his account was disputed by defendant.

III.

THE MARGATE PIER AND HARBOUR COMPANY v. PERRY.

An application had been made in this case to Master Bennett for leave to sign judgment under Order XIV., Rule 1; the application was refused, and the summons indorsed "No order." After the expiration of eight days, no statement of defence having been delivered, the plaintiff signed judgment for his claim. The present summons was to set aside that judgment, and it was contended that, as no notice that the defendant dispensed with a statement of claim had been delivered, the plaintiff was bound to deliver such statement.

ARCHIBALD, J.—Looking at *Atkins v. Taylor*,† I am inclined to think that the judgment was regular. My only doubt arises from the fact of the Master not having expressly given the defendant leave to defend. The Rules seem to contemplate that, where a plaintiff is not allowed to sign judgment under Order XIV., Rule 1, express leave shall be given to the defendant to defend. But I think the indorsement "No order" is equivalent to leave to defend, no time for delivery of a statement of defence being named, and therefore brings this case within the words of Rule 3 of Order XXII., "or if no time be limited, then within eight days." I shall, however, give the defendant leave to defend, and I will make the costs costs in the cause.‡

Where the Master has indorsed "No order" on an application for leave to sign judgment on a specially-indorsed writ, this is equivalent to leave to defend, and if the defendant does not deliver his defence within eight days, under Order XXII., Rule 3, plaintiff may then sign judgment.

* *Weekly Notes*, January 22nd, 1876 (Friday, January 14th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† Vol. I., Chamber Cases, p. 53.

‡ *Weekly Notes*, February 6th, 1876 (Monday, January, 24th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

IV.

Leave will be given to sign judgment on a specially-indorsed writ, although there may be a formal error in the indorsement of the writ under App. (A), P. II., S. 2.

A merely formal difference (such as the misplacing of a date) between the indorsement on a writ and the form of indorsement given under Order III., Rule 6, will be no answer to an application to sign judgment under Order XIV., Rule 1.

Per ARCHIBALD, J. (reversing the Master's decision.)*

V.

PHILLIPS v. HARRIS.

Leave given to sign judgment on a specially-indorsed writ in an action for the hire of a steam pump, although defendant alleged that the pump was insufficient for the purpose for which it was hired.

This was an appeal from the District Registrar of Monmouth, who had ordered judgment to be signed on a specially-indorsed writ, unless the amount of the claim was paid into Court by the defendant. The action was for £65 for the hire of a steam pump and work in putting it up.

F. A. Knight for the defendant.—The object of that Rule was to provide for cases where there was really no defence suggested. We allege that the pump provided was insufficient for the purpose for which it was expressly ordered.

A. Charles for the plaintiff.—The District Registrar acted on the affidavit of the plaintiff, and the plaintiff's bookkeeper, stating that the defendant had called and admitted his claim. The work the pump was hired for was done, and the pump then returned (W.N., p. 294, was referred to).

ARCHIBALD, J.—To a certain extent, on these applications, the question of liability must be tried; but how far one is to try it is a nice question. The Rule must not be rendered inoperative.

Appeal dismissed with costs.†

* *Weekly Notes*, February 5th, 1876 (Monday, January 24th); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

† *Weekly Notes*, February 5th, 1876 (Wednesday, January 26th); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

VI.

WOOLSTON AND ANOTHER v. BAINES.

This was an action for money paid, at the request of the defendant, for differences on the Stock Exchange. Master Hodgson had refused to make an order to sign judgment, under Order XIV., Rule 1, on the ground that there was an arrangement to carry over the account between the parties.

The plaintiffs relied on an admission of the defendant's that the money was due.

ARCHIBALD, J.—How can the agreement between the parties to carry over the account be an answer to this action? It is a mere matter of arrangement, a promise to postpone, for which the defendant cannot suggest any consideration.

Order to sign judgment.

Decision of Master reversed.*

Leave given to sign judgment on a specially-indorsed writ, in an action for money paid for differences on the Stock Exchange, although defendant alleged that there was an agreement (without consideration) to carry over the account.

VII.

BERRIDGE v. ROBERTS.

This was an application for leave to sign judgment under Order XIV., Rule 1, on appeal from the Master. The action was to recover £5,000 and interest, on a joint and several covenant. The defendant set up a deed of release; the answer to that being that the release was an escrow.

Howell, for the plaintiff, asked that, if judgment was not allowed to be signed, at all events the defendant might be ordered to pay the money into Court.

A. B. Harrison for the defendant.

DENMAN, J.—This is a question for a jury to try. The plaintiff brings simply an affidavit, stating that the money is due; and the defendant replies by alleging a deed of release. The plaintiff

Leave to sign judgment on a specially-indorsed writ refused, in an action of covenant in which defendant pleaded a deed of release, and plaintiff replied that the alleged deed was an escrow.

* *Weekly Notes*, February 19th, 1876 (Friday, February 4th); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

has to resort to the difficult affirmative proof that the deed of release was only delivered as an escrow. I shall not order the money to be paid into Court.*

VIII.

Leave given to sign judgment on a specially-indorsed writ, in an action on a guarantee, although defendant swore that the guarantee was given under protest, and obtained by undue pressure.

This was an application on appeal from Master Pollock, to sign final judgment, under Order XIV., Rule 4, in an action on a guarantee.

The defendant's affidavit stated that the guarantee was given in respect of an undelivered bill of costs; that it was given under protest, and obtained by undue pressure; and that the promise was gratuitous.

DENMAN, J.—That the defendant should not have given this guarantee is no defence to the action. Consideration appears on the face of the guarantee, that consideration being the giving up of a lease. It would be cruelty to the defendant to allow this action to go on.

Order.†

RULE 4.

I.

Leave given to sign judgment on a specially-indorsed writ, for a part of the claim admitted by defendant, unless paid within a week.

Upon an application to sign judgment under Order XIV., Rule 4, Master Dodgson had refused to order judgment to be signed for any part of the claim, but had ordered £100, which the defendant practically admitted, to be paid into Court. The plaintiff appealed from this order.

ARCHIBALD, J., made an order that plaintiff be at liberty to sign judgment for £100, unless that sum be paid to him within a week.‡

* *Law Times*, February 19th, 1876 (Saturday, February 5th); *Solicitors' Journal*, *Id.*; *Weekly Notes*, February 26th, 1876.

† *Law Times*, February 26th, 1876 (Tuesday, February 8th); *Solicitors' Journal*, *Id.*; *Weekly Notes*, March 11th, 1876.

‡ *Weekly Notes*, February 5th, 1876 (Monday, January 24th); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

II.

LORD HANMER *v.* FLIGHT.

This was an action for rent or for use and occupation, in the alternative. Master Dodgson had refused to make any order.

C. Bowen for the plaintiff.—The defendant does not deny that he has been in possession from Sept., 1874, to the present time; we are, therefore, entitled to sign judgment for that amount.

Beasley for the defendant.—The defendant is charged throughout the statement of claim as assignee of the lease. His defence is that he is not assignee of the lease. The assignee of the lessor brings this action against the assignee of the lessee. We pay £24 into court for the mesne profits.

ARCHIBALD, J.—The defence set up is no answer to an action for use and occupation, which is admitted for part of the time during which the plaintiff claims.

Order of Master amended by giving liberty to the plaintiff to sign judgment for £157. 10s., arrears of rent.

On the question of costs being raised, *ARCHIBALD, J.*, following the new practice as to costs in appeals, which Mr. Justice Quain had held to apply to appeals from Masters to the Judge, gave the costs of both applications to the plaintiff.*

In an action for use and occupation, and for rent, in the alternative, defendant admitting that he had been in possession for more than a year, leave was given to sign judgment for arrears of rent during that part of the time.

ORDER XVI.

RULE 2.

MERCANTILE RIVER PLATE *v.* ISAAC.

This was an action for the balance due on a promissory note brought under the Bills of Ex-

A bank having brought an

* *Weekly Notes*, February 5th, 1876 (Wednesday, January 26th); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

action for the balance due on a promissory note under the Bills of Exchange Act, an order was made, substituting as plaintiff the banker, who put the note in the hands of the bank, he having omitted to indorse it.

change Act. The present application, on appeal from Master Manley Smith, was to substitute one Hart as the plaintiff in the action. It appeared that the promissory note had been drawn in favour of Hart, who was a banker; that Hart, on leaving England, had put the note into the hands of the Mercantile River Plate Bank, but without indorsing it; and that on its falling due, Hart, having been informed that he had omitted to indorse it, forwarded to the River Plate Bank an indorsed copy of the note. It was in consequence of this informality in the note sued upon that it was desired to substitute Hart as plaintiff in the place of the Mercantile River Plate Bank. An objection taken that, this action being under the Bills of Exchange Act, the new procedure could not be taken advantage of, having been overruled,

DENMAN, J., made the order asked for, reversing the decision of the Master, the substituted plaintiff to pay the costs of both applications.

E. Jones for the substituted plaintiff.

T. Hastings for the defendant.*

RULE 9.

LEATHLEY (on behalf of himself and all others the underwriters, &c.) *v.* MACANDREW AND ANOTHER.†

Where one party sues on behalf of numerous parties having the same interest, a defence to the plaintiff on the record is a defence to the action.

This was an application to stay the above action on the ground of an agreement to refer.

J. C. Mathew for the defendants.—Leathley is bound by an agreement to refer. I am willing to admit that we contracted personally, but not that we are owners.

Butterworth for the plaintiffs.—The other plaintiffs, who were not parties to the agreement to refer, are not bound. If the defendants admit that they are owners, then we do not object to the

* *Law Times*, February 26th, 1876 (Monday, February 7th); *Solicitors' Journal*, *Ib.*; *Weekly Notes*, March 11th, 1876.

† See Vol. I., Chamber Cases, p. 58.

reference. If they admit their ownership, then, of course, they are liable to us in this action.

LINDLEY, J.—This form of action is familiar to Chancery practitioners, and it has always been held that a defence to the plaintiff on the record is a defence to the suit. I do not think the personal liability of the plaintiffs on the agreement to refer is quite the question. If the defendants do not admit ownership there is a question for the jury, and the agreement to refer does not apply.

No order, unless the defendants admit that they were owners of *The Cid*; if they do, order with liberty to apply to settle terms of reference. Costs in the cause.*

RULE 13.

I.

An *ex parte* application was made for leave to add another defendant in an action under the Bills of Exchange Act. The Master had refused the application on the ground that the defendant could not avail himself of the provisions of the Supreme Court of Judicature Acts at this stage. The defendant had obtained leave to appear, and a statement of claim had been delivered.

LINDLEY, J., made an order that the defendant be at liberty to join a third party as defendant.†

Leave given to add another defendant in an action under the Bills of Exchange Act, after delivery of the statement of claim.

II.

BECK v. DEAR.

This was an action by an auctioneer, for his commission on goods sold.

R. Williams for the defendant.—A company built a large hotel, which the defendant furnished; the company has been wound-up, and the fur-

In an action by an auctioneer for his commission on a sale of furniture, supplied by the defendant to

* *Weekly Notes*, January 29th, 1876 (Thursday, January 20th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, January 22nd, 1876 (Saturday, January 15th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

an hotel company, which was subsequently wound up, an application by defendant to join the official liquidator as a plaintiff for the purpose of bringing a counter-claim against him, in respect of an alleged property in half the furniture, was refused.

niture has been sold by auction by agreement of all parties. The auctioneer has brought this action against us, and we have a claim against the official liquidator of the company in respect of an alleged property in half of the furniture. We say that the auctioneer sold for the liquidator. We wish the official liquidator to be joined as a plaintiff, that we may bring our counter-claim, which arises out of the same matter, against him, and have it decided in this action.

Bullen for the plaintiff.

LINDLEY, J., would make no order. Costs to be plaintiff's in any event.*

III.

LOVELL v. HOLLAND.

In an action for mesne profits against an ejected tenant of plaintiff's land, received during plaintiff's lunacy, an application by defendant to join plaintiff's sister as defendant in respect of rent paid her by him, and applied to plaintiff's maintenance in an asylum, was refused.

This was an action for mesne profits against the defendant, who had been tenant of the plaintiff's land during his incarceration in an asylum. An action of ejectment had already been successfully brought against the same defendant. The damages were assessed by the plaintiff at the rent which the defendant had been paying. The present application was on appeal from Master Hodgson by the defendant, and was that Miss Lovell, the plaintiff's sister, might be made a party to the action, and might be ordered to deliver a statement of defence in the place of the present defendant. The defendant's case was that he had paid rent to Miss Lovell, and that she had applied the money so paid to the expenses of the plaintiff's residence in the asylum.

ARCHIBALD, J.—The procedure of which the defendant wishes to avail himself rather contemplates the case of a defendant who is not liable, or who is to a great extent free from any default.

* *Weekly Notes*, January 29th, 1876 (Saturday, January 22nd); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

Here the defendant is a trespasser. Why should the plaintiff be put to prove that any money was paid to Miss Lovell? If the defendant was led to believe that Miss Lovell was the person to whom the rent should be paid, and paid it to her under a mistake of fact, he has a simple remedy against her for money had and received.

Appeal dismissed with costs.*

IV.

LERECULEY v. HARRISON AND OTHERS.

This was an action by a merchant against solicitors for negligence. The defence was that the negligence, if any, was the negligence of Kilby, whom the defendants had instructed. Master Manley Smith had made an order, joining Kilby as a defendant in the action, and the plaintiff appealed against this order.

Horne Payne for the plaintiff.—The defendants do not apply, as they might have done, under Rules 17, 18, and 19 of Order XVI., in which case notice must have been given to the third party from whom they claimed indemnity; but they apply under Rule 13 of that order. *Williams v. Andrews* (Vol. I. Chamber Cases, p. 60) and *Smith v. Haseltine* (*Id.*, p. 56) are the only two cases I have found where this Rule has been applied; and in those cases the circumstances are quite different from those in this case. The Rule was probably intended to meet any difficulty which might arise from the abolition of pleas in abatement. The Master has now ordered us to sue a defendant, whose liability we do not recognise.

Bullen for the defendants.—We say that Kilby is the party who is really liable. We admit retainer by the plaintiff, but we say that with his consent our managing clerk put the matter in Kilby's hands. I submit that one of the objects

In an action by a merchant against solicitors for negligence, in which the defendants admitted their retainer, but alleged that the negligence was not theirs, but that of a third person, in whose hands they put the matter with plaintiff's consent, an application by defendants to join this third person as a defendant was refused.

* *Weekly Notes*, February 5th, 1876 (Monday, January 24th); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

of Rule 13 was to meet the difficulty of not being able to put in evidence at the trial everything that was material, through persons who were connected with the matters in question not being joined. If we had served Kilby with a notice of indemnity under Rule 18, he need not have made himself a party to the action unless he chose to do so; and if he chosenot to put in an appearance, the essential part of our evidence would have been shut out. If it should turn out that thejoinder of Kilby was unnecessary or unreasonable, the costs occasioned by such joinder will fall upon us.

LINDLEY, J.—I think that this application is not within Rule 13 of Order XVI., and that the Master was mistaken.

Name of defendant Kilby to be struck out; decision of Master reversed.*

V.

CORMACK v. GROFRIAN AND ANOTHER.

In an action by a shipowner against consignees of the cargo, to which a counter-claim was set-up for damage to the cargo, leave to join part owners alleged to be partly liable on the counter-claim, as co-plaintiffs, was refused.

This was an action by a shipowner, against two consignees of goods carried by him, for demurrage. A counter-claim had been delivered for damage to cargo. The plaintiff then took out the present summons, which was to add other parties as plaintiffs, on the ground that they were part owners, and, therefore, partly liable on the counter-claim. Master Hodgson had refused to make the order.

Webster for the defendants.—Under Order XVI., Rule 13, no plaintiff can be joined without his consent; under the old practice, that consent had to be verified by affidavit.

Witt for the plaintiff.—The rights of the parties whom I wish to join are the same as those of the present plaintiff. This action is being brought for their benefit. Under the old system we might have been nonsuited for not joining these parties.

* *Weekly Notes*, January 29th, 1876 (Friday, January 21st); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

We can no longer plead in abatement to the counter-claim, and it would be very hard if, because the plaintiff brings the action alone, which he is entitled to do, we should have to meet alone a subsequent claim with regard to which other persons are liable as much as himself.

LINDLEY, J., dismissed the appeal with costs.*

RULE 17.

COMMISSIONERS OF WATERFORD *v.* VEALE, BEGG,
AND EVANS.

This was an action for expenses incurred in removing wreck.

Sutton for the defendants.—We have served the Great Western Railway Company with a notice that we claim indemnity from them; they consent to come in and defend the action, and to our withdrawing.

C. Bowen for the plaintiffs.—We object to that, unless the Great Western Railway Company admit their liability; the present defendants have done so.

Myburgh for the Great Western Railway Company.—We are willing to admit our liability.

POLLOCK, B., made an order for the Great Western Railway Company to be defendants, they admitting the cause of action and their liability.†

In an action for expenses incurred in removing wreck, the defendants claiming indemnity from a railway company, which admitted its liability, the company was substituted as defendants in place of the original defendants.

RULES 17, 18, 19.

DAWES AND ANOTHER *v.* THORNTON AND OTHERS.

This was an action by builders for work done under a contract to build a church. The defendants now desired to serve a third party with notice that they claimed indemnity from him. The nature of the claim for indemnity was that Mr. Barry, the architect, had ordered costly extras, and had no

In an action by builders for work done in building a church, leave was given to defendants to serve the architect with

* *Weekly Notes*, January 22nd, 1876 (Wednesday, January 12th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, January 22nd, 1876 (Friday, January 14th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

notice of a claim for indemnity in respect of costly extras ordered by him without express authority.

authority to order them, and must, therefore, indemnify the defendants. It was stated that the question would be whether these extras were a reasonable outcome of the contract.

Order made by ARCHIBALD, J., for leave to serve notice on C. Barry.*

RULE 21.

THE NATIONAL PROVINCIAL BANK OF ENGLAND v. THE BRADLY BRIDGE CHARCOAL, IRON, AND FOUNDRY COMPANY.

On an application by defendants for directions as to future proceedings, in an action by the holders of a bill of exchange against them as acceptors, in which the drawer had appeared as a third party after notice that defendants claimed indemnity from him for partial failure of the consideration, defendants were directed to pay the amount of the bill, less the amount of the alleged failure,

This was an action on a bill of exchange by the holders against the acceptors, and a notice had been served by the latter upon Hewetson, the drawer of the bill, that they claimed from him part indemnity. Hewetson had appeared pursuant to the notice, and the defendants now applied, under Rule 21, of Order XVI., for directions as to future proceedings in the action.

Moulton for the defendant.—The ground of our claim for indemnity against the drawer is the partial failure of the consideration for the acceptance. If the drawer will pay to us the amount of the failure of consideration (about £95), we will allow judgment to be signed for the whole sum.

Warburton Pike for Hewetson.—I deny the failure of consideration. As that is now the only question in dispute, I propose that I should be substituted for the present plaintiffs, and sue the defendants on the bill.

ARCHIBALD, J.—The defendants are willing to pay the amount of the bill to the plaintiffs, less the amount of the alleged failure of consideration; Hewetson must pay the plaintiffs what will make up the whole amount due on the bill, and then can continue this action to recover the sum so paid.

* *Law Times*, February 12th, 1876 (Thursday, February 3rd); *Solicitors' Journal*, *Id.*; *Weekly Notes*, February 19th, 1876. See, also, *Macdonald v. Bode*, reported under section 24, sub-section (3), of the Supreme Court of Judicature Act, 1873.

Order, defendants undertaking to pay plaintiffs £ and interest, and on payment of the further sum of £958 interest and costs by Hewetson to the plaintiffs, Hewetson to be substituted as plaintiff in this action, and to be at liberty to proceed for £ .*

the drawer to pay the latter amount, and then to be substituted for the holders as plaintiff.

ORDER XIX.

RULE 3.

I.

FOWLER v. LEE.

This was an appeal from the District Registrar of Liverpool, who had refused the plaintiff's application to sign judgment. The action was brought under the old procedure, and the writ specially indorsed in the same manner as it would now be under Order III., Rule 6. The special indorsement on the writ was as follows:—"April, 1875. To amount of account rendered for work done by the plaintiff for the defendant at his request in and about the keeping and training of a horse of the defendant, £51. 5s." Conflicting decisions as to whether judgment could be signed under Order XIV., Rule 1, under any circumstances, when the writ has been indorsed before the Supreme Court of Judicature Acts came into operation, were referred to. It was stated that the District Registrar had said that at any rate he would not make the order after issue joined.

Leave given, in an action for work done, commenced before 1st November, 1875, to deliver a counter-claim in lieu of pleading a set-off, both parties consenting.

Channell for the plaintiff.—The general order of Mr. Justice Lush that, where no declaration has been delivered before the 1st November, the proceedings should be continued under the old system, was expressly stated to be subject to special orders. If there is no defence to this action, why should it go to trial? The defendant's claim to a set-off is in reality only ground for an action of trover.

W. C. Gully for the defendant.—My claim to a set-off is in respect of certain harness, &c., left

* *Weekly Notes*, February 12th, 1876 (Monday, January 31st); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

by the defendant with the plaintiff. That might be for goods sold; leaving goods in the possession of another is, under certain circumstances, evidence of a sale. We paid £25 on this claim, and this proceeding was not taken by the plaintiff till after issue joined. Supposing the set-off not to be good, if the plaintiff can avail himself of the new procedure the defendant can also, and my defence is good as a counter-claim. If this action goes on, we shall apply to bring it under the Supreme Court of Judicature Acts in order to file our counter-claim.

DENMAN, J.—I shall affirm the Registrar's decision, and, if both parties consent, I will give the defendant leave now to file his counter-claim.

No order; costs to be defendant's in any event. Defendant to be at liberty to proceed by way of counter-claim.*

II.

BARTHOLOMEW v. RAWLINGS.

In an action to recover the balance of money due on the sale of a public-house, defendant was permitted to set up a counter-claim for the return of money paid as a deposit on false representations made by the plaintiff's agent to defendant, and to join the agent as co-defendant.

This was an action brought to recover the balance of money due on the sale of a public house. It was desired to set up a counter-claim for the return of money paid as deposit on false representations alleged to have been made to defendant by one Smith; and for this purpose an application had been made to Master Bennett to join Smith as a co-defendant to the counter-claim, which was refused. That decision was now appealed against.

Clyde for the defendant.—Our answer to this claim is that the takings were warranted to be up to a certain amount, and that they were not equal to that amount. Smith was the plaintiff's broker and agent, and we allege that he made false representations to us as to the value of the business, which induced us to make the deposit.

* *Law Times*, February 19th, 1876 (*Monday*, February 20th); *Solators' Journal*, *ib.*; *Weekly News*, February 20th, 1876. N.B.—See, further, under section 22, sub-section (3), of the Supreme Court of Judicature Act, 1873.

Beard for the plaintiff.—Mrs. Bartholomew has made no false representations; why should she be prejudiced in her action by this counter-claim? Besides prejudicing her case, it will postpone the action, and therefore keep her longer out of this money which she alleges is owing to her. If Smith has made false representations, an action for damages can be brought against him.

to the counter-claim.

ARCHIBALD, J.—There is no doubt whatever that a defendant is entitled to set up any counter-claim that is not so incongruous as to be incapable of being conveniently tried with the original claim. I think a claim for the return of deposit money on the ground of fraud may be very conveniently tried in an action for the balance of purchase-money on a sale, when the whole defence to the action is on the ground of fraudulent representation by the agent. I cannot say that these claims are of such an incongruous kind as to be unfit to be tried together. I regret that there may be some delay in the trial of the action, owing to the joinder of Smith; but that cannot be avoided.

Order to join Smith as a party to the counter-claim; and costs to be defendant's in any event.*

RULE 4.

I.

WINGARD v. COX.

This was an action of slander, and the defendant now applied for an account of the names and addresses of divers persons mentioned in the statement of claim, and in what respects the plaintiff's business was falling off.

Particulars of the names and addresses of persons mentioned in the Statement of Claim, and of how the plaintiff's business was falling off,

DENHAM, J.—The defendant is asking the plaintiff for the names of persons who were passing in the street at the time of the alleged slander being uttered; that can certainly not be allowed.

* *Weekly Notes*, February 5th, 1876 (Saturday, January 29th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

asked as an action of slander.

To ask for particulars of damages in an action for slander is a very novel application: and to ask for the particulars of damages occasioned by the business falling off is only another way of asking what business the plaintiff did before the slander. It is very doubtful whether the plaintiff would be allowed at the trial to give particular evidence of damages occasioned by the falling off of his business.

*Dismissed with costs.**

II.

BARKLEY v. ROOPE.

Were the said forms of pleading well served as models, they are not necessarily abolished by the Judicature Acts. In an action for money had and received for the plaintiff's use, the statement that defendant received a sum of money for the plaintiff's use is all that can be required; the circumstances under which he received it need not be stated.

This was an action for money had and received for the plaintiff's use. Master Sir P. Pollock had ordered the plaintiff to amend his statement of claim by stating the circumstances under which the defendant received the £95. and when, where, and under what circumstances the account was stated between them. This order was now appealed against.

G. B. Allen, for the plaintiff, cited Order XIX., Rule 4.

Boreford, for the defendant, cited forms in the Appendices to the Act of 1875, for cases that would formerly have come under a count for money had and received.

The statement of claim was as follows:—

1. One Christopher John Mursell paid to the defendant for the use of the plaintiff £95, and the defendant had and received the said sum from the said C. J. Mursell for the use of the plaintiff.

2. The defendant with the consent of the plaintiff retained £5 as commission for his trouble, and paid to the plaintiff the sum of £45, parcel of the said £95 so received by him as aforesaid, leaving a balance of £45, which is wholly due and unpaid to the plaintiff.

* *Law Times*, February 26th, 1876 (Wednesday, February 9th); *Solicitors' Journal*, *ib.*; *Weekly Notes*, March 11th, 1876.

The plaintiff claims £45 and interest thereon from, &c.

ARCHIBALD, J.—The only material facts in this case are that, the defendant received the money, and that he received it for the plaintiff's use. Where the old forms will serve as models, they are not necessarily abolished by the Supreme Court of Judicature Acts. Where the defendant has received a sum of money for the plaintiff, the statement of that fact is all that can be required. The Master's decision will be reversed, and, following the new practice, the whole of the costs will be the plaintiff's in any event.*

III.

COLONIAL ASSURANCE CORPORATION (LIMITED) v. PROSSER.

This was an action of slander in which Master Sir F. Pollock had refused to make an order for particulars of the statement of defence.

Tindal Atkinson for the plaintiff.—The defendant denies that he spoke or published the words we charge him with. He then goes on to say that as agent of the Union Life Assurance Company he met with one David Lamb and others, and that all such statements as were made in conversation between them were made for the purpose of advising Lamb as to insurance. He then says that the words that were used were true. We want particulars of what passed at the conversation referred to.

Pritchard for the defendant.

ARCHIBALD, J.—The defendant admits that he had a conversation with Lamb, but denies that he used the words the plaintiffs allege as slanderous; and he says further that whatever was said about the plaintiffs was true. It is wholly immaterial what those statements were.

Appeal dismissed with costs.†

Particulars of what passed in a conversation referred to in the statement of defence, refused as immaterial, in an action of slander.

* *Weekly Notes*, February 5th, 1876 (Wednesday, January 26th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, February 6th, 1876 (Thursday, January 27th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

ORDER XXI.

RULE 4.

I.

COTTON v. HOUSMAN.

In an action by a widow, as administratrix of her late husband, an auctioneer, against his solicitor, particulars of the claim were ordered to be delivered, in addition to those specially indorsed on the writ.

This was an action by a widow, as administratrix, against the Solicitor of her deceased husband, who was an auctioneer. The writ was specially indorsed, and the plaintiff gave a notice that the claim was that which appeared by the indorsement upon the writ. The present summons was taken out by the defendant for a statement of claim and particulars. The Master had refused the application.

Archibald, for the plaintiff, said that no further particulars of the claim could be given than those indorsed on the writ.

Will for the defendant.

LINDLEY, J., made an order for the plaintiff to deliver the best particulars she can in a week; defendant to have eight days after delivery of particulars to put in his statement of defence. Summons adjourned generally.*

II.

SCHOMBERG v. ZOEKELLI.

In an action in which it did not clearly appear what was plaintiff's claim, and defendant wished to get up a counter-claim, a further statement was ordered to be delivered, in addition to that specially

This was an application for further and better particulars of claim in an action where the writ was specially indorsed, and the plaintiff had delivered a notice that his claim was that which appeared by the indorsement on the writ, instead of delivering a statement of claim.

In support of the application it was stated that the plaintiff made a large claim for interest at 12 per cent.; that, as regarded the interest, the defendant disputed the claim. The defendant also desired to set up a claim for damages in respect of caps sent to the plaintiff, a merchant at Singapore, to be sold for the defendant, which caps had been

* *Weekly Notes*, January 22nd, 1876 (Wednesday, January 12th); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

transmitted by the plaintiff without any authority to Hong Kong, where, having been spoilt on the voyage, they were sold at a loss. *indorsed on the writ.*

DENMAN, J.—The form of the summons should not have been for particulars, but for further statement of claim. What the defendant really wants is not particulars of the pleadings, but that it should appear on the pleadings what is his case and what is the plaintiff's. I think this is a case where it will be better to have a statement of claim.

Order for further statement of claim.*

ORDER XXII.

RULE 3.

See *THE MARGATE PIER & HARBOUR COMPANY v. PERRY*, reported under Order XIV., Rule 1.

RULES 5, 6, & 7.

See under Order XVI., Rule 13, and Order XIX., Rule 3.

RULE 9.

NICOLSON *v.* JACKSON.

This was an application to strike out a counter-claim in the above action, which was for libel. The alleged libel was contained in a circular letter published by defendant among the shareholders of the Haune Colliery Company (Limited). The plaintiff was one of the directors of the company, who were charged in the letter with conspiracy and fraud. The defence was that the communications were privileged, and there was a counter-claim for damages for loss sustained in respect of shares bought on false representations. *In an action for libel brought by a director of a company, a counter-claim for damages for loss sustained by defendant in respect of shares in the company bought on false representations*

* *Law Times*, February 26th, 1876 (Wednesday, February 9th); *Solicitors' Journal*, *ib.*; *Weekly Notes*, March 11th, 1876. See, also, Order XIV., Rule 3.

made by the directors, was struck out, on terms.

not responsible on this counter-claim, but the other directors also. The action for libel is a simple one; the counter-claim will be long and involved. The libel is a very gross one, and this counter-claim must prejudice the plaintiff.

Underhill for the defendant.—If we have really been induced to buy shares by their fraud, it would be absurd that they should be allowed to bring an action of libel against us, and perhaps recover damages, merely because we cannot technically justify.

LINDLEY, J.—This is one of those cases where it would be very difficult to keep the jury from mixing up the two claims.

Order to strike out counter-claim, without prejudice to any action the defendant may bring, and on the terms that the plaintiff in this action shall not issue execution on any judgment he may obtain without leave of a Court or a Judge. Costs in the cause.

In this case, under the provisions of the new scale of costs, a special allowance of £1 1s. was made to the solicitor on each side.*

ORDER XXIII.

An order of the Master staying an action, was varied by substituting the word "discontinuing" for "staying," so as to put an end to the action altogether.

This was an application by a defendant to vary an order of Master Walton, staying an action on payment of costs. It was contended that he had no power to make such an order, and that the summons, the wording of which the order followed, was misconceived, as it followed the old practice. It was further contended that this order would enable the plaintiff to go on with the action subsequently, and that the defendant had now a right to be put in the same position as if he had a judgment in his favour.

LINDLEY, J.—It seems to me to be very immaterial; but I will vary the order by substituting the word "discontinued" for "stayed."†

* *Weekly Notes*, January 29th, 1876 (Tuesday, January 18th); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

† *Weekly Notes*, January 29th, 1876 (Saturday, January 22nd); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

ORDER XXVII.

RULE 1.

I.

In an action of trespass, an application was made to strike out the statement of claim. The writ was issued in June, and Master Dodgson had ordered a statement of claim to be filed within eight days. The plaintiff then served a copy of the indorsement on the writ as a statement of claim. The defendant now contended that this was no statement of claim.

LINDLEY, J.—It is an informal statement, but it need not be struck out.

Statement to be amended in a week, otherwise order. Costs in the cause.*

In an action of trespass the Master having ordered a Statement of Claim to be delivered, plaintiff delivered a copy of the indorsement on the writ, and the Judge refused to strike it out.

II.

BARNICOT v. HANN AND CROSS.

This was an action for money lent. A summons had been taken out by the plaintiff to strike out the statement of defence.

Wilberforce for the plaintiff.—The statement of defence contains four distinct and inconsistent allegations, namely, that the plaintiff never lent the money; that, if he did, he lent it to somebody else; that the defendant had paid the money; and that the plaintiff had released the defendant. This is the old form of pleading which the Supreme Court of Judicature Acts have abolished.

Witt for the defendant.

LINDLEY, J.—Where the old form of pleading is applicable, there is no objection to it. A defendant is entitled to say that he never was lent the money, and that, if he was, he has paid it, or been released. No order.†

Where unobjectionable, inconsistent pleas may still be employed as under the old system of pleading, (e.g., that the money was never lent; and that the defendant has paid it back; and that plaintiff released defendant).

* *Weekly Notes*, January 22nd, 1876 (Monday, January 17th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, January 22nd, 1876 (Monday, January 17th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

III.

HOPE v. BANKS.

In an action for an alleged breach of an agreement to take an assignment of a lease of a house, plaintiff set out letters between the parties, and alleged that they contained the agreement, and the Judge refused to strike out the Statement of Claim as embarrassing.

This was an action for an alleged breach of an agreement to take a house. The plaintiff was to have assigned his lease to the defendant, and had written naming a day upon which he could give up possession; but before the day named his wife became ill, and he wrote to the defendant saying he should be unable to give possession on that day. The defendant then took another house; and shortly after having done so received a letter from the plaintiff, offering to give possession in three weeks. The plaintiff, in his statement of claim, had set out certain of the letters between the parties, and alleged that they contained a contract on the part of the defendant to take an assignment of plaintiff's lease.

Grantham had applied to the Master, and now appealed to the Judge, to strike out this statement of claim as embarrassing, and as not setting out the facts on which the plaintiff relied.

MacLeod for the plaintiff.

LINDLEY, J., dismissed the appeal, with costs.*

IV.

GOLDING v. THE WHARTON RAIL AND RIVER SALT COMPANY.

In an action for breach of a contract to deliver as much salt as the plaintiff should require for three months, an application to strike out from the

This was an action for the breach of a contract to deliver as much salt as the plaintiff should require for three months. Master Manley Smith had refused to strike out several paragraphs from the statement of defence, and that decision was now appealed from. One of the paragraphs which it was desired to strike out denied the breach on the ground that the plaintiff's requisitions were unreasonable. The other paragraphs objected to stated that the contract was entered into with the

* *Weekly Notes*, January 29th, 1876 (Wednesday, January 19th); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

plaintiff as director of a company. The contract was also set out, but there was nothing upon its face to show that the contract was other than a contract with the plaintiff personally.

F. O. Crump for the plaintiff.—The salt was to be delivered by rail or river as the plaintiff should require. Our requisitions were for 480 tons per week. If there was any doubt as to the law, it would be right to drive me to demur. But the law is clear that the defendant should have protected himself in the contract; as he has contracted without reservation, he must either deliver what we require, or indemnify us, unless he alleges that our demands were made not for the purposes of our business, but for the purpose of defrauding him. As to the defence that the contract was with the plaintiff as a director, parol evidence will only be admitted to prove that there was no contract, and is not admissible for the purpose of varying the written contract. This paragraph of the defence raises a false issue.

J. B. Allen for the defendant.—One of the chief questions in the action will be whether the requirements made were the requirements of Golding, Davis, and Co., or of Golding personally. We say that we contracted with him in one capacity, and that he made his requisitions in another capacity.

LINDLEY, J.—There are two questions to be decided in this action; first, what is the intention of the contract? and, secondly, what is the true character of the requirements that have been made. I do not think that these paragraphs of the statement of defence are embarrassing, and I shall not strike them out.

Appeal dismissed with costs.*

V.

SMITH AND OTHERS *v.* WEST.

This was an action on a guarantee, and an ap-

Statement of Defence a paragraph, which alleged that plaintiff's requisitions (480 tons a week) were unreasonable, and that the contract was entered into with plaintiff in a different capacity from that which appeared by the contract itself, was refused.

Facts and evi-

* *Weekly Notes*, January 29th, 1876 (Saturday, January 22nd); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

defence are in many cases so mixed up as to be undistinguishable. Particulars of a paragraph in the Statement of Defence ordered to be given instead of striking it out.

plication was made to strike out the statement of defence. One objection to the statement of defence was that it stated that a condition precedent to defendant's liability on the guarantee was that the plaintiff should make an open and unsecured advance, and that he had not given a credit within this undertaking, without stating whether that undertaking was verbal or in writing, when made, or the parties to it. It was suggested that this was a violation of the rule that forbids the pleading of evidence.

Arbutnot for the plaintiff.

Forbes for the defendant.

ARCHIBALD, J.—There are many cases in which facts and evidence are so mixed up that they are almost undistinguishable.

Other alterations were agreed upon by counsel, and an order was made for particulars of the above paragraph of the statement of defence, and to amend as arranged by counsel.*

VI.

MENHINICK AND ANOTHER v. TURNER.

A paragraph in the Statement of Defence which set out matters that were alleged to be equivalent to a release from an agreement, was struck out on the ground that defendant should have demurred.

This was an action on an agreement to pay £100 as premium on obtaining a spirit licence. The alleged agreement was contained in a lease for three years, dated May, 1871. The defence set up was that the lease was void, and that there was a second lease in substitution of it. The statement of claim set out the agreement relied upon. The Master had struck out the fourth paragraph of the statement of defence, and that decision was now appealed from. The paragraph in question stated that the agreement of 1871 had been mutually rescinded by varying its final term; that it was void as an agreement and as a lease; that a lease made in September, 1874, was a new, final, and conclusive contract; that the lease of 1874

* *Weekly Notes*, February 5th, 1876 (Thursday, January 27th); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

was not granted upon the terms of the agreement sued on, but at a higher rent; and that therefore, if the defendant was not before released from that agreement, he was released by that circumstance.

Bray for the plaintiff.

Foard for the defendant.

ARCHIBALD, J.—These are all points of law proper to be raised by a demurrer; they are not matters of fact. I think the Master is right.

Appeal dismissed with costs.*

VII.

ADERIS v. THRIGLEY.

This was an action for malicious prosecution. Master Hodgson had made an order striking out certain paragraphs from the statement of claim, and that order was now appealed from.

Moulton for the plaintiff.—The Master thought that I had set out evidence in my statement; but I submit that I have only set out the *res gestæ*. I have stated what we say does not amount to reasonable and probable cause, so that, if the defendant takes a different view, he can demur. The Master treated this as a question of fact, whereas it is really a question of law. I submit that I am entitled so to state my claim as to raise the question of law.

Bullen for the defendant.—This is an infringement of the rule against pleading evidence. I do not for a moment admit that the plaintiff is entitled to have the facts so stated as to try by demurrer, if in doing so he infringes the Act.

ARCHIBALD, J.—It would have been sufficient to have stated simply that there was no reasonable and probable cause. What is the use of stating such facts as that the plaintiff denied the charge of stealing which the defendant made

In an action for malicious prosecution, paragraphs, in the Statement of Claim, that set out facts, which plaintiff said did not amount to reasonable and probable cause, were struck out; plaintiff should simply have stated that there was no reasonable and probable cause.

* *Weekly Notes*, February 5th, 1876 (Friday, January 28th); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

against him? That is what everyone does when charged with theft. I think the Master has reduced the statement within proper limits.

Appeal dismissed with costs.*

VIII.

DUNCAN v. VEREKER.

Where, to an action on a voluntary bond, defendant pleaded fraud, and gave details of cohabitation and false representation as in an answer to a bill in Chancery, most of the paragraphs in the Statement of Defence were struck out as scandalous.

This was an action brought on a voluntary bond, and the defence set up was one of fraud. Master Gordon had ordered paragraphs 3, 4, 5, 6, 7, 8, 10, and part of 12, to be struck out of the statement of defence, and that order was now appealed from.

Solomon for the defendant.—The facts are set out as they would have been in an answer to a bill in Chancery.

Nasmyth for the plaintiff.

ARCHIBALD, J.—It would have been sufficient for the defendant to have set out that there had been cohabitation between the parties, and the false representations which induced the defendant to give the bond without going into all these details. This comes within the words of Order XXVII, Rule 1, "any matter which may be scandalous." Matter of this sort is not fit to appear on the pleadings.

Order of Master affirmed. Costs of this application to be plaintiff's costs in any event.†

IX.

CADOGAN ADVANCE COMPANY (LIMITED) v. SHEPHERD.

To an action by a company on a promissory note, defendant

This was an action on a promissory note for £90, given in 1871, and renewed from time to time. The third paragraph of the defendant's

* *Weekly Notes*, February 5th, 1876 (Saturday, January 29th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, February 12th, 1876 (Tuesday, February 1st); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

statement of defence, claimed, by way of counter-claim and set-off, payment of £190 in respect of scrip held by defendant in plaintiff's company. The Master had refused to strike this out on the ground that it was a good counter-claim; and, if not good, then matter for demurrer. The defendant was the principal shareholder in the plaintiff company, which was now being wound-up voluntarily.

Cooper Wyld for the defendant.

ARCHIBALD, J.—The holder of scrip may be entitled to shares, but not to money. The defendant must set out enough to show that he has a claim for money against the plaintiffs—shares are not money.

Order: paragraph 3 to be amended or excluded. Costs to be costs in the cause.*

ORDER XXVIII.

RULE 2.

WILKS AND OTHERS v. PARKER.

In this case the defendant had demurred to the plaintiff's statement of claim, and Master Johnson had refused to strike out the demurrer as frivolous. The plaintiff now appealed. The action was for breach of an agreement to pay deposit money.

Cooper for the plaintiff.—The case of *Pordage v. Cole* (1 Wms. Saund. 548) shows clearly that this demurrer is bad. Moreover, under the Supreme Court of Judicature Acts, this may be treated as a claim for specific performance. Or the money I ask for as due under the agreement may stand as the amount of damages I claim for the breach.

Hall for the defendant.—By the agreement, £2,000, being part of the purchase-money on the sale of an estate, was to be paid by a certain date,

pleaded, by way of set-off and counter-claim, a payment in respect of scrip in the company. Held, that defendant showed a claim merely to shares and not to money, and that this part of the defence must be struck out or amended.

In an action for breach of an agreement to pay deposit money, the Statement of Claim, instead of asking for damages, asked for the deposit money as a debt. Held, that a demurrer to the Statement of Claim could not be struck out as frivolous; but

* *Law Times*, February 12th, 1876 (Thursday, February 3rd); *Solicitors' Journal*, *ib.*; *Weekly Notes*, February 19th, 1876.

*plaintiff had
leave to amend.*

and the time of conveyance was fixed at a certain date. The plaintiff is entitled to damages for the breach of the agreement to pay the deposit money; but the statement of claim asks for the £2,000 deposit. He could only claim that in an action for specific performance.

ARCHIBALD, J.—The real point is, is this money due to the plaintiff as a debt? If it is not, the demurrer is good; it is certainly not frivolous.

Appeal dismissed with costs; the plaintiff to have liberty to amend the statement of claim.*

RULE 5.

*Leave given to
plead and
demur, the
ground of
demurrer being
that the State-
ment of Claim
disclosed no
cause of
action.*

An application had been made to a District Registrar for leave to plead and demur—the ground of demurrer being that the statement of claim disclosed no cause of action—and had been refused.

Monckton for the plaintiff.

Anstie for the defendant.

LINDLEY, J., reversed the decision, and made the order.†

ORDER XXIX.

RULE 1.

*An action on a
bill of ex-
change against
the indorser
was stayed,
nothing having
been done by
plaintiff
since de-
fendant's
appearance
to the writ
five months
previously,
and plaintiff
having been*

This was an appeal from a Master's decision, refusing to dismiss an action for want of prosecution. The action was on a bill of exchange, and the writ was served in August last. Leave to appear was obtained on August 12th, 1875, and notice of appearance sent to the plaintiff on the following day. Nothing had since been done. On behalf of the plaintiff it was stated that as he had been paid by the acceptor he had not gone on against the indorser, and that the indorser had given him a cheque for the amount, which, on endeavouring to cash, was found to be stopped. On behalf of the defendant, it was argued, that

* *Law Times*, February 12th, 1876 (Wednesday, February 2nd); *Solicitors' Journal*, *Ib.*; *Weekly Notes*, February 19th, 1876.

† *Weekly Notes*, January 29th, 1876 (Monday, January 17th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

under the old procedure a notice to deliver the declaration in four days could have been delivered, and if not complied with, judgment would have been signed for costs; that the money paid was paid in a different action, and that the present defendant had paid nothing; that he gave a cheque for the amount of the bill to the plaintiff on the condition that it should not be cashed if the plaintiff recovered from the acceptor; and that the plaintiff should not have issued two writs, one against the indorser and another against the acceptor; both should have been included in one writ.

paid the amount of the bill by the acceptor.

LINDLEY, J.—I shall certainly not let the action go on simply to determine who is to pay the costs. All further proceedings in the action to be stayed; the defendant to pay the costs of the writ.*

ORDER XXX.

RULE 4.

BROADHURST v. WILLEY.

This was action in the County Court, and there was now an appeal from the Master as to costs. The defendant had purchased wool to the value of £500 odd, and he paid nearly the whole price before receiving the goods. The question between the parties was whether the remaining balance due was £33 or £43. The defendant sent a cheque for £33 to the plaintiff, which was returned. The plaintiff's solicitor then sent a letter to the defendants asking for £43. In reply, the defendant offered to pay the £33, and to try the question as to the £10 in the County Court. This the plaintiff declined to accept, and served a writ of £43 upon the defendant. The defendant paid £33 into Court, and the plaintiff took it out in satisfaction of the entire cause of action. For the defendant it was now asked that the plaintiff should not have

Order XXX., Rule 4, enabling a plaintiff, who takes money out of Court, to sign judgment for his costs, is governed by Order LV., which gives the Judge the power of depriving him of these costs. A plaintiff was deprived of these costs, because he

* *Weekly Notes*, January 29th, 1876 (Tuesday, January 18th); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

refused to accept a lesser sum than that which he claimed, and issued a writ for the larger sum, and then took the lesser sum out of Court in full satisfaction.

the costs of the action, and it was contended that Order LV. gave the Judge a discretion in the matter. For the plaintiff it was contended that there was no discretion as to costs in these cases, and that the Master had acted in accordance with Order XXX., and also in accordance with the practice before the Supreme Court of Judicature Acts. The Judge took time to consider the question, and to-day gave judgment.

LINDLEY, J.—The true construction of Order XXX., Rule 4, and Order LV., is that Order XXX., Rule 4, is subject to Order LV., and the effect of the two Rules is that, in cases falling within Order XXX., Rule 4, the plaintiff is entitled to his costs, unless there are some sufficient reasons for depriving him of them; but if there are, he can be so deprived. In this case, I am of opinion that there are sufficient reasons for depriving him of his costs; for it is plain that the writ was not required to enable the plaintiff to obtain the money paid into Court, and accepted in satisfaction of the plaintiff's claim. The real dispute between the parties was as to a sum of £10, and the writ was issued to obtain this sum. The plaintiff has thought proper to abandon his claim; the writ has, therefore, served no useful purpose whatever. Under these circumstances, I think it would be unjust to compel the defendant to pay the plaintiff's costs of the action. I reverse the order of the Master, and stay proceedings, and leave each party to pay his own costs.*

ORDER XXXI.

RULE 1.

I.

McCORQUODALE v. BELL AND ANOTHER.

In an action for conspiring to deprive

This was an action for improper tender; issue had been joined, and an order was now applied for by the plaintiff to deliver interrogatories.

* *Weekly Notes*, January 22nd, 1876 (Monday, January 10th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

English Harrison for the plaintiff.—Our case is that the defendants improperly got hold of our tender for stationery to the Great Western Railway Company, and then altered their tender so as to make it lower. We allege that the defendants and one Becket maliciously conspired together for that purpose. The interrogatories go to prove that the defendants, Becket, and Sydenham, a clerk of the Great Western Railway Company, were in the room together when this took place, and what occurred. As they have denied our allegations, we are entitled to ask them questions to prove them.

plaintiff of the benefit of a tender for stationery to a railway company plaintiff was allowed, after issue joined, to administer interrogatories tending to implicate persons other than the defendants.

J. Francis for the defendants.—My objection to these interrogatories is that they tend to implicate other persons than the defendants.

LINDLEY, J.—I think that, under the circumstances of the defendants having denied this charge, the plaintiff is entitled to put these interrogatories.

Order.*

II.

This was an action for damages for wrongfully building houses, &c., on land adjoining the plaintiff's. No statement of claim had yet been delivered. The plaintiff now applied for an order for discovery.

Before interrogatories can be administered, a Statement of Claim should, except under special circumstances, be delivered.

ARCHIBALD, J.—I think you must deliver a statement of claim before you can have discovery, except under special circumstances. I can conceive that this might be used for very oppressive purposes; a writ might be served, and then an application of this sort made in order to fish out a case.

Adjourned till after delivery of statement of claim.†

* *Weekly Notes*, January 29th, 1876 (Friday, January 21st); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, February 5th, 1876 (Monday, January 24th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

III.

On an application for discovery, it was objected that no statement of claim had yet been delivered. It was stated that the indorsement on the writ gave full particulars.

ARCHIBALD, J., adjourned the case till delivery of statement of claim.*

IV.

S. P.

An application for discovery by a defendant, who had not yet delivered his statement of defence, and who showed no special ground for applying at this stage, was adjourned till after statement of defence, ARCHIBALD, J., stating that that was the proper time to apply, except under special circumstances, and that the order would then be given as a matter of course, unless the pleadings showed the case to be one in which discovery could not be wanted.†

V.

S. P.

On an application being made for discovery, it appeared that the statement of claim had not been delivered, and the application was at once adjourned by ARCHIBALD, J., till after the delivery of a statement of claim.‡

VI.

S. P.

In an action for the detention of a deed, the defendant's application for discovery was adjourned by ARCHIBALD, J., till after the delivery of the statement of defence.§

* *Weekly Notes*, February 5th, 1876 (Monday, January 24th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, February 5th, 1876 (Monday, January 24th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

‡ *Weekly Notes*, February 5th, 1876 (Thursday, January 27th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

§ *Weekly Notes*, February 5th, 1876 (Friday, January 28th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

VII.

STRONG v. TAPPIN.

This was an action, commenced under the Bills of Exchange Act, on five bills of exchange. Interrogatories had been delivered to the defendant, who had obtained leave to appear, but had not yet delivered a statement of defence.

Warburton Pike, for the defendant, said that the statement of defence, which was about to be delivered, began by admitting the plaintiff's case; so that the interrogatories, which were for the purpose of proving the plaintiff's case, were unnecessary.

F. Knight, for the plaintiff, said that Order XXXI., Rule 1, said that interrogatories might be delivered at the same time as the statement of claim.

LINDLEY, J.—This is the bad practice that used to prevail in equity, of filing interrogatories on the bill without knowing or caring what the answer will be. The plaintiff should have waited to file interrogatories until the statement of defence had been delivered. There may be cases, as where fraud is alleged, where interrogatories may be filed before the statement of defence is delivered, but they are exceptional. I shall not do anything to encourage the revival of the old Chancery abuse.

Order for interrogatories to be struck out,* without prejudice to any fresh interrogatories which the plaintiff may desire to deliver after the statement of defence.†

The practice of delivering interrogatories with the Statement of Claim is a bad one, borrowed from the Chancery practice of filing interrogatories on the bill, without knowing or caring what the answer will be. Interrogatories delivered after appearance and before the Statement of Defence struck out.

VIII.

FENWICK v. JOHNSTON.

This was an action on a bill of exchange, and an application was made to strike out interro-

Interrogatories delivered with

* See Rule 5 of this Order.

† *Weekly Notes*, January 22nd, 1876 (Thursday, January 13th); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

the Statement of Claim were struck out, as premature.

gatories delivered by the plaintiff with his statement of claim,* *Strong v. Tappin* (*supra*, p. 51) was referred to.

ARCHIBALD, J., made an order to strike out interrogatories on the ground that they were premature, the statement of defence not having been delivered.†

IX.

DRAKE v. WHITELEY.

S. P.

This was an action for damages for the unskilful management of a horse and cart by defendant's servant. Interrogatories had been delivered by the plaintiff with his statement of claim, and an application was now made to strike them out.‡

ARCHIBALD, J.—After the decision in *Strong v. Tappin* these interrogatories should not have been delivered before the statement of defence, which may make them all unnecessary. Under the old system the practice of delivering useless interrogatories was very prevalent, but now it seems worse than before.

Order to strike out the interrogatories.§

X.

COTCHING v. HANCOCK.

S. P.

Interrogatories delivered by the plaintiff in this case with his statement of claim, before statement of defence, were struck out** by ARCHIBALD, J. Costs to be defendant's costs in the cause.††

* See Rule 5 of this Order.

† *Weekly Notes*, February 5th, 1876 (Wednesday, January 26th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

‡ See Rule 5 of this Order.

§ *Weekly Notes*, February 5th, 1876 (Thursday, January 27th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

** See Rule 5 of this Order.

†† *Weekly Notes*, February 5th, 1876 (Thursday, January 27th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

XI.

MERCANTILE MUTUAL INSURANCE COMPANY *v.*
SHOESMITH.

In this case an application was made for discovery by the defendant. The statement of defence had not been delivered. *S. P.*

ARCHIBALD, J.—I think in all these cases parties may be put to very great expense unnecessarily. The object I have in view is to keep down the costs, which would become enormous now, if no check was to be put upon these applications. When the statement of defence is delivered, unless that shows that discovery cannot possibly be wanted, it will be allowed as a matter of course.

Adjourned till after statement of defence.*

XII.

PLUM *v.* NORMANTON IRON AND STEAM CO. (LIMITED).

In this case, an application for discovery by the defendant before delivery of the statement of defence, was adjourned. *S. P.*

ARCHIBALD, J., stating that these unnecessary applications would soon be dismissed with costs.†

XIII.

HAWLEY *v.* READE.

This was an action on a bill of exchange, and the defendant had obtained leave to appear. The defence set up was that the plaintiff was suing for the benefit of the drawer as his nominee, and that there had been a total failure of consideration. The defendant now applied for leave to deliver interrogatories before his statement of

In an action on a bill of exchange, defendant, who sought to ascertain by interrogatories whether plaintiff was a

* *Weekly Notes*, February 12th, 1876 (Wednesday, February 2nd); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

† *Law Times*, February 12th, 1876 (Wednesday, February 2nd); *Solicitors' Journal*, *ib.*; *Weekly Notes*, February 19th, 1876.

mere nominee of the drawer without consideration, was allowed to administer them before delivering a Statement of Defence, as, if plaintiff proved to be a holder for value without notice, no Statement of Defence would be put in.

defence; the interrogatories went to prove the above defence. The defendant desired to obtain the information at this stage, as it would enable him to see whether the failure of consideration would be a defence to this action.

ARCHIBALD, J.—I think this is a case for allowing interrogatories before the statement of defence. To do so may save expense. If the plaintiff is a holder for value without notice no statement of defence will be put in.

Order that the defendant be at liberty to deliver the interrogatories, and to have further time to deliver his statement of defence until the interrogatories are answered.*

RULE 5.

I.

WINTERS v. DABBS.

That interrogatories, otherwise unobjectionable, are merely open to criticism, is no reason for striking them out.

On an application to strike out interrogatories that had been administered by a defendant to support his counter-claim,

LINDLEY, J., said :—I think that interrogatories should only be struck out when they are objectionable or oppressive. The mere fact that they are open to criticism is not a reason for striking them out. I do not understand that it is the business of the Judge to settle interrogatories.

No order. Costs in the cause.†

II.

SIVIER v. HARRIS.

In an action against an auctioneer for the price of a

This was an action against an auctioneer for the price of a horse that had been sold by him for the plaintiff. The defence was one of fraud,

* *Weekly Notes*, February 12th, 1876 (Wednesday, February 2nd); *Law Times*, *Ib.*; *Solicitor's Journal*, *Ib.*

† *Weekly Notes*, January 22nd, 1876 (Tuesday, January 11th); *Solicitors' Journal*, *Ib.*; *Law Times*, *Ib.*

and was, that the plaintiff had represented the horse to be quiet and a good worker, well knowing it not to be so, and that the auctioneer had represented this to one Coulson, the purchaser.

An application was now made to strike out interrogatories that had been delivered by the defendant to the plaintiff.

The two following interrogatories were ordered by LINDLEY, J., to be struck out:—

2. Was the horse, which is the subject of this action, the property of the plaintiff at the time of the sale?

3. If it was his property, how did it become so?*

horse sold by him for plaintiff, defendant, who pleaded fraud, was not allowed to ask whether the horse was plaintiff's, and if so, how did it become his.

III.

In an action for breach of promise of marriage, interrogatories administered by the plaintiff to prove mere expectations of means by defendant, as to the means of his relations, and as to any settlement made by them on defendant's present wife, were struck out by LINDLEY, J.†

Interrogatories as to defendant's means struck out in an action for breach of promise of marriage (per Lindley, J.).

IV.

An application was made to strike out, as irrelevant, forty-five interrogatories delivered by the defendant, in an action of ejectment by a mortgagee against a mortgagor.

LINDLEY, J.—Interrogatories must have some connection with the pleadings. I shall strike these out on the general ground that they have nothing to do with the matter in question as it appears on the pleadings. Interrogatories to be struck out, without prejudice to any fresh interrogatories the

In an action of ejectment by mortgagee against mortgagor forty-five interrogatories were struck out as irrelevant.

* *Weekly Notes*, January 22nd, 1876 (Wednesday, January 12th); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

† *Weekly Notes*, January 22nd, 1876 (Wednesday, January 12th); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.* This decision appears to clash with one of Mr. Justice QUAIN, reported Vol. I., Chamber cases, p. 105.

defendant may be advised to deliver. Costs to be plaintiff's in any event.*

V.

PHILLIPS AND ANOTHER *v.* BARRON AND ANOTHER.

In action for non-acceptance of patent button-fastening machines, interrogatories as to the French law on the subject were struck out; also interrogatories to shew plaintiff had bought the goods cheaply.

In an action for refusal to accept goods sold, the goods in question being patent button-fastening machines, seven interrogatories as to the French law on the subject, delivered by the defendant to the plaintiff, were struck out,

ARCHIBALD, J., remarking that the plaintiff could not be regarded as an expert in French law.

Two other interrogatories were also struck out, which went to prove that the plaintiffs had themselves bought the goods delivered to the defendants at a cheap price.

F. Knight for the defendants.

Bigham for the plaintiffs.†

VI.

BARTHOLEMUEW *v.* RAWLINGS.

An interrogatory as to the receipts of the business prior to its sale, was allowed.

This was an action brought to recover the balance of money due on the sale of a public-house. An application was made to strike out the following interrogatory, delivered by the defendant to the plaintiff:—What were the monthly receipts of the business which formed the subject of the alleged agreement?

Mr. Justice ARCHIBALD allowed the interrogatory, costs to be defendant's in any event.‡

* *Weekly Notes*, January 29th, 1876 (Thursday, January 20th); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

† *Weekly Notes*, February 5th, 1876 (Tuesday, January 25th); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

‡ *Weekly Notes*, February 5th, 1876 (Saturday, January 29th); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

VII.

ARMITAGE *v.* FITZWILLIAM AND OTHERS.

This was an action of fraud against the directors of a company. The defendants now applied to strike out interrogatories delivered to them by the plaintiff.

J. Rigby, for the plaintiff, took the objection that the application was too late, as more than four days had elapsed since the interrogatories were delivered.

R. E. Webster, for the defendant.—That is provided for by Order LVII., Rule 6.* These interrogatories were delivered with the statement of claim, and are the statement put into the form of interrogatories.

ARCHIBALD, J.—If this application had been made before the delivery of the statement of defence, these interrogatories would have been struck out as premature. As it is, they are so framed that it would be almost impossible to answer them. Why should they not be put in such a form that the defendant can answer "Yes," or "No," to them?

Order for interrogatories to be reformed. Costs to be defendant's in any event.†

Interrogatories so framed that it was almost impossible for defendant to answer them, were ordered to be reformed, so that defendant might be able to say, "Yes" or "No" to them.

VIII.

BUCHANAN *v.* TAYLOR.

This was an action of libel, and the plaintiff now applied to strike out interrogatories that had been administered by the defendant.

MacClymont, for the plaintiff.—The defendant attempts to fill up a general plea of justification by interrogatories. He cannot do that. A plea of justification must state particulars of every act of misconduct that the defendant has charged

In an action for libel interrogatories which were administered, in support of a plea of justification, by defendant to plaintiff,

* Which gives the Judge power to enlarge the time.

† *Weekly Notes*, February 5th, 1876 (Saturday, January 29th); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

asking him what articles he had written, were struck out. Defendant might have asked "Did you not in certain papers write such and such articles?"

the plaintiff with (*Gourley v. Plimsoll*, L. Rep., 8 C. P., 560).

R. Williams for the defendant.

ARCHIBALD, J.—The defendant first says that the plaintiff published certain articles, and then seeks to interrogate him as to what articles he has written. That the plaintiff wrote under an assumed name will not justify the defendant in charging him with writing anything that he has not written. The defendant must know that the plaintiff has written the articles upon which he seeks to justify, and not have to interrogate him to discover it. That is fishing for a defence. The defendant might ask, "Did you not in certain papers write such and such articles?" but not, "What articles did you write?" He is only entitled to put particular circumstances to the plaintiff, and to ask him whether it was under those circumstances.

Order to strike out three of the interrogatories.*

IX.

In an action on a policy of insurance defendant, an underwriter, assignee of the policy, denied the facts alleged by plaintiff. Held, that plaintiff had a right to interrogate defendant as to these facts.

This was an action on a policy of insurance, the defence being a general denial and an allegation of unseaworthiness. The defendant was an underwriter who had accepted an assignment of the policy. The present application was to strike out interrogatories delivered by the plaintiff to the defendant. In support of the application it was argued that the interrogatories were simply the whole statement of claim put into interrogative form; that, as the defendant was only assignee of the policy, he could only say in answer that he knew nothing of the matters interrogated upon; and that he had denied the allegations in the statement of claim only with the object of putting the plaintiff to strict proof of them.

* *Weekly Notes*, February 12th, 1876 (Wednesday, February 2nd); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

DENMAN, J.—If the defendant denies the facts which the plaintiff alleges, the plaintiff has a right to interrogate him as to them. If the defendant is able to swear truly that he knows nothing about the matters in question, that would be clearly a sufficient answer.

No order.*

RULE 10.

See under Rule 23 of this Order.

RULE 12.

I.

LEY v. MARSHALL.

This was an action for damages for breach of duty in and about the carrying of goods by sea. An application was now made by the plaintiff for an order for discovery. The statement of claim had not yet been delivered.

J. C. Mathew for the plaintiff.—The plaintiff's case is that the ship was overladen. We could have delivered a declaration, but not a statement of claim, without discovery.

Hollams for the defendant.

LINDLEY, J., made an order for usual affidavit of documents relating to the cause of action mentioned in the affidavit of *J. H. White*, within a week.*

Order made for discovery of documents before delivery of Statement of Claim in an action for damages for overloading ship.

II.

An application being made for discovery of documents, it was objected that the applicant named no document in his opponent's possession.

It is no bar to discovery of documents that

* *Law Times*, February 26th, 1876 (Tuesday, February 8th); *Solicitors' Journal*, *Ib.*; *Weekly Notes*, March 11th, 1876.

† *Weekly Notes*, January 22nd, 1876 (Thursday, January 13th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

applicant names no document in his opponent's possession.

LINDLEY, J.—That is an exploded doctrine. He is entitled to discovery as a matter of course, unless you can make out an objection to his having it. The onus is on you. He cannot know what documents you have until he gets your affidavit.*

III.

Where defendant, a bankrupt, swore that he had no documents in his possession, he was required to state what documents passed from him to the trustee.

An application was made for further discovery of documents. The defendant's affidavit stated that he had no documents in his power, possession, or control. It appeared that the defendant was a bankrupt, and that all his books and papers had been handed over to the trustee.

LINDLEY, J.—The defendant must state what documents passed from him to the trustee, and the fact of their so passing.

Order for further affidavit within a week, as to documents that have been in defendant's power, possession, or control.†

IV.

In an action for negligence against a railway company, insufficient lighting of the station being alleged as one of the causes of the accident, discovery of documents relating to the lighting of the

This was an action for negligence against a railway company, and cross-summonses had been taken out for discovery. The defendant's summons asked for discovery of the plaintiff's business accounts for the past five years, and this was allowed. The plaintiff's summons asked for discovery of reports of other accidents at the same station, of documents showing number of tickets issued at the station, and of documents relating to the lighting of the station.

An order for discovery as to the two first items was refused by ARCHIBALD, J., but made by him

* *Weekly Notes*, January 22nd, 1876 (Monday, January 17th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, January 29th, 1876 (Tuesday, January 18th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

as to the last (insufficient lighting being alleged as one of the causes of the accident.*)

station was ordered.

RULE 13.

On an application for an order for discovery of documents, an objection was taken that the action was one of ejectment, and that the applicant named no document of which he sought discovery.

Order for discovery of documents made, though no document named, in action of ejectment, as applicant might in his affidavit object to produce, and so protect himself.

LINDLEY, J.—You can protect yourself in your affidavit with regard to any documents for which you claim privilege.

Order made.†

RULES 14, 17, & 18.

I.

Application was made for leave to inspect a document mentioned in the second paragraph of the statement of claim. The action was one of ejectment by mortgagees against the executors of the deceased mortgagor. The defendants desired to inspect the mortgage deed.

Mead for the plaintiff.

F. O. Crump (for the defendants) cited *Patch v. Ward* (L. Rep. 1 Eq. 436), and stated that the defendants wished to know the amount of the mortgage in order to redeem.

LINDLEY, J.—I shall make no order for production, the plaintiffs undertaking to give in a week a statement of principal, interest, and amount of costs, and of the particulars of all other subsequent incumbrances. The defendants will have to make the first mortgagee and all subsequent holders of charges parties to their claim to redeem.‡

Application for leave to inspect the mortgage deed, (a document mentioned in the Statement of Claim) to ascertain the amount of the mortgage, refused, in an action of ejectment by mortgagees against mortgagor's executors, plaintiffs undertaking to state the amount.

* *Weekly Notes*, February 5th, 1876 (Monday, January 24th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, January 22nd, 1876 (Wednesday, January 12th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

‡ *Weekly Notes*, January 22nd, 1876 (Friday, January 14th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

II.

LAKE AND ANOTHER v. POOLEY.

In an action for breach of a covenant in a lease, where defendant had assigned an undivided moiety of the property, inspection of documents was ordered, although relating solely to defendant's title.

This was an action for breach of covenant in a lease. The defendant had made an assignment of one undivided moiety of leasehold property, consisting of land, brewery, and fixtures. The plaintiff now applied for an order for inspection of documents, and the defendant objected that the documents related solely to his own title.

ARCHIBALD, J.—I should not make the order if it was a distinct property; but this is an undivided moiety, the interest in which can only be realised by the usufruct of the whole property. This is an extremely complicated case, and I shall make the order and leave the defendant to appeal if so advised.

Order for inspection.*

III.

In an action of trespass, inspection of two documents mentioned in the pleadings was sought by plaintiff and refused, defendant objecting that these documents were his own title-deeds, as freeholder.

This was an action of trespass, and the plaintiff asked for inspection of two documents named in the pleadings. For the defendant it was objected that he was freeholder, and these documents were his title-deeds; that the plaintiff set up a twelve years' possession, but without stating whether as tenant or freeholder; and that the defendant denied his title altogether. For the plaintiff, it was said that if these title-deeds were shown, the plaintiff might at once discontinue the action.

ARCHIBALD, J., declined to make any order. Defendant's costs in the cause.†

RULE 23.

Where, in the latter part of an answer to

An objection was taken to an answer to an interrogatory administered by the plaintiff in an

* *Weekly Notes*, February 5th, 1876 (Thursday, January 27th); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

† *Weekly Notes*, January 29th, 1876 (Monday, January 24th); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

action* on the ground that it stated the defence to the action as well as answering the interrogatory.

Warburton Pike for the plaintiff.—I do not object to his putting that part of his answer which states his defence into a separate answer, because then I can object at the trial to its being read, and ask that it may be proved by witnesses. But if it remains part of another answer it renders the whole answer useless, as I cannot read part of an answer.

Bigham for the defendant.—My friend cannot ask me to give two answers to one question.

LINDLEY, J.—I cannot say that the defendant must split up his answer to suit the plaintiff's convenience. I think there may arise cases where such an application would be granted; but here, I think, the latter part of the answer, which is objected to as matter of defence, is a qualification of the former part.

No order.†

ORDER XXXIII.

SICKLES v. NORRIS.

This was an action by General Sickles upon an alleged agreement to pay him a marginal surplus upon a contract for the sale of 33,000 Remington rifles entered into between Messrs. Norris and Remington.

C. Bowen now applied, on behalf of the plaintiff, for an account to be taken of the amount of such margin in the hands of Messrs. Norris, and stated that they had admitted a moral, if not a legal, obligation.

Horne Payne, for the defendant, referred to the note to Order 20 of the Chancery Consolidated Orders in Morgan's Equity Practice, that order

an interrogatory defendant was alleged to have stated the defence to the action, an application that he should answer further, on the ground that plaintiff could not read the other part of the answer separately at the trial, was refused, the latter part of the answer being merely a qualification of the former part.

Before making an order for an account of a marginal surplus in the hands of defendants upon a contract for sale, which surplus plaintiff claimed under an alleged agreement by defendants to pay it him, it

* See Rule 10 of this Order.

† *Weekly Notes*, January 29th, 1876 (Friday, January 21st); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

*is necessary
that a prima
facie legal or
equitable case
should be made
out by
plaintiff.*

being substantially the same as Order XXXIII. of the Supreme Court of Judicature Act, 1875, under which the present application was made.

ARCHIBALD, J.—I do not think any legal claim has been admitted by the defendant. Does equity enforce a gift, unless something has been done in pursuance of it? If the money had been paid, the defendants would probably not be able to recover it. I think before making this order, it is necessary that a *prima facie* legal or equitable case should be made out by the plaintiff. I will refer the summons to the Court.*

ORDER XXXV.

RULE 1.

See the case of OGUR *v.* BRADBY, reported under Order II., Rule 6.

RULES 11 AND 12.

See under Order XII., Rule 4.

RULE 13.

See the case of OGUR *v.* BRADBY, reported under Order II., Rule 6.

ORDER XXXVI.

RULE 1.

PLUM *v.* NORMANTON IRON, & CO., COMPANY.

*To oust
plaintiff's
right of fixing
the place of
trial, the
defendant
must show
preponderating
convenience*

A plaintiff has now an absolute right of fixing the place of trial, subject to the defendant's showing such a preponderance of convenience in trying elsewhere as to oust that right.—*Per* DENMAN, J.†

* *Weekly Notes*, February 12th, 1876 (Tuesday, February 1st); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

† *Law Times*, February 26th, 1876 (Tuesday, February 8th); *Solicitors' Journal*, *Id.*; *Weekly Notes*, March 11th, 1876. See under Order XXXI., Rule 12, S. C.

RULES 19, 20, AND 22.

LANE v. EVE AND ANOTHER.

This action had been tried before POLLOCK, B., and on its being called on the plaintiff was absent, and the defendant appeared. The jury was sworn, and a verdict taken for the defendant, the Judge certifying for a special jury. Subsequently the plaintiff applied to set aside the judgment, which was done on the terms that the plaintiff should pay the costs of the day, all costs thrown away, and the costs of the application to tax. The question now arose on appeal from the Taxing Master, whether the sum of £12. 12s. should be allowed the defendant as costs of the special jury.

Where, for default of appearance of plaintiff at the trial, defendant is "entitled to judgment dismissing the action," the jury should not be sworn.

Clay for the plaintiff.—It was unnecessary to swear the jury. Under Order XXXVI., Rule 19, it is not intended that a verdict should be taken.

Lumley Smith, for the defendant, referred to the words in Rule 22 of the same Order, "direct that judgment be entered for any or either party, as he is by law entitled to upon the findings," and doubted whether "judgment dismissing the action" would be a final and conclusive judgment, so as to prevent the plaintiff bringing another action.

DENMAN, J.—I agree that the practice of not swearing the jury is right, but as it was done under a mistake, I think the fair course would be for each party to pay half the costs.

Order by consent for each party to pay £6. 6s., costs in the cause.*

ORDER XXXVII.

RULES 2 AND 4.

STORER v. SIMMONS AND OTHERS.

This was an issue directed by Master Dodgson, *Rules 2 and of Order*

* *Law Times*, February 19th, 1876 (Saturday, February 5th); *Solicitors' Journal*, *Ib.*; *Weekly Notes*, February 26th, 1876.

XXXVII. as to cross-examining witnesses, do not apply to the cross-examination of parties to the cause.

between a judgment debtor and a judgment creditor and garnishees.

Lumley Smith for the plaintiff.—I apply now, under Rules 2 and 4 of Order XXXVII., for an order against the defendants to come up and be cross-examined. Judgment has been obtained in our favour against Simmons for £1,740. We have obtained a garnishee order against Arnold and Lewis. In December, 1875, Arnold and Lewis denied that they had money owing or accruing to Simmons; they now admit £640, and deny as to the remainder. They bought Simmons' business in October, 1874, for £30,000, giving a bill of sale to Simmons on the whole property. This bill of sale is still registered with no satisfaction against it. The question is whether we are not entitled to cross-examine them as to the truth of their statements. Even in an ordinary unliquidated claim under Order XIV., Rule 3, the defendant may now be ordered to come forward and be cross-examined. The whole spirit of the Act is opposed to our being driven to trial, when an interlocutory proceeding such as this may render it unnecessary.

F. Knight for the defendant.—The affidavit of the garnishees gives a perfectly natural account of the transaction. They show exactly how the money has been paid by degrees. It would be an undeserved reproach to order them to be cross-examined. As to what my friend says about being driven to trial, there will be no trial of this issue; it must be referred to an accountant.

LINDLEY, J.—It is quite obvious that there is a great difference between these persons, though they are witnesses, and ordinary witnesses: because they are not only witnesses, but you have a question to try with them, which renders this course unnecessary. The Rule was inserted to meet the case of an ordinary witness, not a party to the case, against whom there would be no other power.

Appeal dismissed with costs.*

* *Weekly Notes*, January 29th, 1876 (Saturday, January 22nd); *Law Times*, *ib.*; *Solicitors' Journal*, *ib.*

ORDER XLIV.

RULE 2.

See under Order IX., Rule 2.

ORDER LI.

RULE 1.

THE GENERAL STEAM NAVIGATION COMPANY *v.*
THE LONDON AND EDINBURGH SHIPPING COMPANY.

An application was made by the defendants to transfer this action to the Admiralty Division. The action was one of negligence, and arose out of a collision between the plaintiffs' and the defendants' vessels in the river Thames, the former being at anchor, and the latter being steered by a pilot.

ARCHIBALD, J.—If this had been out in the high seas, and there had been questions of seamanship, of complicity, there might have been a case for transferring this action. But if I transfer this I must transfer every case of collision.

No order. Costs to be plaintiffs' in any event.*

An application by defendants to transfer to the Admiralty Division an action for negligence, arising out of a collision in the Thames, was refused, no question of seamanship on the high seas being involved.

ORDER LII.

RULE 3.

I.

COOPER AND OTHERS *v.* INCE HALL COMPANY.

This was an action of trespass between adjoining colliery proprietors; the plaintiffs now applied for an order for inspection of defendants' mine, and, for that purpose, for the removal of barriers erected by the defendants between the mines, or for liberty to go down into the defendants' mine and for liberty to take measurements, samples, &c.

In an action of trespass against an adjoining colliery owner, order made for inspection of that part of defendant's

* *Weekly Notes*, February 5th, 1876 (Monday, January 31st); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

mine which lay under or near the mine of plaintiff, and to measure the coal taken away from under plaintiff's land. Order to inspect the whole of defendant's mines, to remove barriers and take samples, refused.

Myburgh for the plaintiffs.—We want to inspect their mine, in order to see how far they have trespassed upon our ground, and how much of our coal has been taken away.

Gully for the defendants.—The whole question between us is where the boundary is. This rule was never intended to enable a colliery proprietor to get an inspection of his neighbour's mine by a mere allegation of trespass. Our colliery covers 800 acres, and theirs about seven acres. The affidavit of defendants' manager states that it is most important, for reasons apart from this action, that the working of defendants' mines should not be seen by the plaintiffs.

LINDLEY, J.—An order for inspection of this kind is so common in Chancery that I should have thought this was a matter of course. My impression is that the plaintiffs are entitled, almost as a matter of course, to inspect the defendants' mines about the alleged boundaries; but that if the defendants can suggest any method by which that can be done without the plaintiff seeing the whole of their mines, they are entitled to have the inspection so limited. I shall make no order as to removing barriers, or as to taking samples.

Order to inspect the mine and workings of the defendants under and near the plaintiff's mines as delineated or described, and to measure the coal taken away from under the plaintiff's lands. Two days' notice of inspection to be given. Inspection to be made through the pits of defendants, unless other access is provided. No notice to inspect for a week. Costs of this application to be costs in the cause. Statement of claim to be delivered a week after inspection.*

II.

In an action for obstruction of light and

In an action for obstruction of light and air, an application was made, on appeal from Master

* *Weekly Notes*, January 22nd, 1876 (Saturday, January 15th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

Pollock, for inspection of the plaintiff's premises by the defendant. No statement of defence had yet been delivered, and it was stated none could be until inspection had been obtained.

ARCHIBALD, J.—I must see whether your defence is that there is no obstruction, or that the plaintiff has no ancient lights. You must deliver your statement of defence before you can have inspection.

No order.*

air, held, that, prior to inspection of plaintiff's premises, defendant must deliver his Statement of Defence.

ORDER LV.

See under Order XXX., Rule 4.

ORDER LVIII.

RULE 12.

Under Rule 12 of Order LVIII. on the application of parties, Lindley, J., ordered that a copy of the Judge's notes should be printed for the purposes of the appeal.†

A copy of the Judges' notes ordered to be printed for Court of Appeal.

RULE 16.

I.

SOUTHWELL v. ROWDITCH.

This was an application for a stay of proceedings for the purpose of an appeal.

Aspland for the plaintiff.—As an appeal is now no stay of execution, I ask that the defendant pay £330 into Court; and also that he pay the costs of this summons, and be under terms to give notice of appeal within fourteen days; otherwise no stay.

In an action brought on a bought note, proceedings were stayed pending an appeal, and the Judge declined to order the money in.

* *Weekly Notes*, February 5th, 1876 (Monday, January 24th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, January 22nd, 1876 (Thursday, January 13th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

dispute to be paid into Court by the appellant.

Lumley Smith for the defendant.—I object to being ordered to pay the money into Court. This is an action between two merchants, and there is no suggestion of insolvency against the defendant. The action is brought on the technicalities of a bought note.

LINDLEY, J.—I shall not order the money to be paid into Court.

Order for stay of proceedings, notice of appeal to be given within fourteen days; costs of this application to be plaintiffs.*

II.

GRANT AND ANOTHER *v.* THE BANQUE FRANCO EGYPTIENNE.

In an action against a corporation, a demurrer to the jurisdiction having been overruled, a stay of proceedings was ordered, pending appeal, but the Judge declined to order security to be given by the appellants.

In this action a demurrer had been argued, and decided against the defendants, and the plaintiffs were going on to try the issues of the fact and to tax the costs of the demurrer.

Foard, for the defendants, now applied for a stay of proceedings, pending an appeal.—The demurrer raises the question whether the defendant being a corporation, the Lord Mayor's Court has jurisdiction. The plaintiffs have declared in prohibition. In consequence of the question having been virtually decided by your Lordship's Court we were unable to argue it. The effect of the judgment is that the attachment which the defendants had obtained still exists, but that the writ of prohibition issues, which prevents their acting upon it. £258,000 was in the hands of Grant, and we took the usual proceedings in the Lord Mayor's Court, which operated as a *distringas*. We are informed that Grant has since parted with this money. We submitted to a judgment on the demurrer simply for the purpose of an appeal.

Anderson for the plaintiffs.—We deny that Grant has parted with this money. We have got

* *Weekly Notes*, January 29th, 1876 (Wednesday, January 19th); *Law Times*, *Id.*; *Solicitors' Journal*, *Id.*

judgment on demurrer, and under Order LVIII., Rule 16, an appeal is no stay, unless otherwise ordered; and they have not given us notice under Rule 2. We are entitled to have security for the costs of the prohibition up to this time, which will amount to nearly £2,000.

ARCHIBALD, J.—The rule formerly was that there could not be more than one judgment in an action; there could not be separate judgments on issues of facts and issues of law. But under the Supreme Court of Judicature Acts that, no doubt, is altered. It is not now, as it was formerly, considered of great importance to have only one taxation of costs. I shall make the order to stay till after the judgment of the Court of Appeal; and you can apply to the Court of Appeal if you have any ground for asking for security.

Order, all further proceedings therein to be stayed till after the judgment in the Court of Appeal. Costs in the cause.*

APPENDIX (A).

PART II.

SECTION 2.

See under Order XIV., Rule 1, § III.

APPENDIX (B).

FORM 9.

An objection was taken by *Warburton Pike* that the affidavit of documents filed by the defendant was insufficient, as it made no mention of books, and had not followed the statutory form.

Bigham.—The form given by the Act is optional.

LINDLEY, J.—The statutory form is the right form, and is intended to be the common form.

The form of affidavit of documents given in App. (A), Form 9, is exhaustive in its terms,

* *Law Times*, February 12th, 1876 (Wednesday, February 2nd); *Solicitors' Journal*, *Ib.*; *Weekly Notes*, February 19th, 1876.

and must be followed.

An affidavit of documents is intended now to be exhaustive, and the form given in the Act is so. .
Order for better affidavit of documents.*

ADDITIONAL RULES OF COURT

Of 12th August, 1875.

ORDER VI.

The sum of 3s. allowed for costs of a summons to attend at Judges' Chambers does not include the sum of 1s. subsequently allowed for costs of the copy of the summons for service.

An application was made on appeal from a decision of Master Johnson as to costs. The applicant stated that all the Masters of the Exchequer Division agreed with Master Johnson, but that all the Masters of the other Divisions were of a contrary opinion. The decision in question was as to whether the sum of 3s. allowed in the Schedule of Costs to Order VI., of the Additional Rules of Court of August 12th, 1875, for a "summons to attend at Judges' Chambers," included the allowance subsequently mentioned, as to "summons to attend at the Judges' Chambers, for each copy to serve, 1s." Master Johnson had considered that the 3s. must include the Court fees, as the note just above that allowance expressly stated that the preceding allowances did not include the Court fees.

LINDLEY, J., took time to consider the question, and subsequently reversed the decision of the Master.†

* *Weekly Notes*, January 29th, 1876 (Friday, January 21st); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

† *Weekly Notes*, January 22nd, 1876 (Wednesday, January 12th); *Law Times*, *Ib.*; *Solicitors' Journal*, *Ib.*

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